SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER, ET AL., PETITIONERS,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

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[fol. 2] [Caption omitted]

[fol. 3]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS, 95th JUDICIAL DISTRICT

No. 73418-E/D

Dovie Ray Baker, et al.

v.

Texas & Pacific Railway Company.

Plaintiffs' Third Amended Original Petition—
Filed September 14, 1956

To the Honorable Judge of Said Court:

Now comes Dovie Ray Baker, Administratrix of the estate of Claude Baker, deceased, hereinafter called Plaintiff, complaining of Texas & Pacific Railway Company, hereinafter called Defendant, and amends her Second Amended Original Petition, heretofore filed herein, so that the same being amended, shall read as follows:

I.

That Defendant, Texas & Pacific Railway Company, is now and was at all times mentioned herein a corporation, duly incorporated under an Act of Congress; that at all times mentioned herein, Defendant owned, maintained and operated a continuous line of railway in the State of Texas, passing through various citites (sic) and towns, including the City of Dallas, Texas; that at all times mentioned herein, Defendant was engaged in the business of a common carrier, transporting for hire freight and passengers over said railway line, and at all times mentioned herein was engaged in the operation of engines, cars and trains over said railway lines; that Defendant is domiciled in Dallas,

Dallas County, Texas, where it has its principal office and where service of citation has been had upon its proper corporate officers.

II.

That Plaintiff, Dovie Ray Baker, is the surving (sic) wife of Claude Baker, deceased, and Bobby Glen Baker, Claudette Baker and Olita Fay Baker are the minor children [fol. 4] of Plaintiff and Claude Baker; that Claude Baker left surviving him no other child or children; that Bobby Glen Baker is a boy about 12 years of age; that Claudette Baker is a girl about 10 years of age; that Olita Fay Baker is a girl about 7 years of age; that each of said minor children reside with Plaintiff in Dallas, Dallas County, Texas.

That Claude Baker died intestate on or about the 20th day of August, 1952, that Letters of Administration have been duly issued to Plaintiff Dovie Ray Baker, as Administratrix of the estate of the said Claude Baker, deceased, by the Probate Court of Dallas County, Texas, and Plaintiff Dovie Ray Baker has duly qualified and is now serving as Administratirix (sic) of the estate of the said Claude Baker, deceased.

III.

That Plaintiff brings this suit in her representative capacity for the use and benefit of herself and the children above mentioned for the recovery of benefits provided under the terms and provisions of the Federal Employers Liability Act; that Plaintiff, Dovie Ray Baker and her minor children are the sole and exclusive beneficaries (sic) of the Said Claude Baker, deceased.

IV.

That on or about the 1st day of April, 1952, and the 2nd day of December, 1952, Defendant, Texas & Pacific Railway Company entered into contracts and agreements with W. H. Nichols & Company, Inc. whereby the said W. H. Nichols & Company, Inc. was to perform certain maintenance and

repair work on Defendant's roadbed in Dallas, Dallas County, Texas; that said work was a part of the regular maintenance and upkeep of Defendant's line of railway tracks then in use in interstate commerce and said contract, [fol. 5] while purporting to constitute W. H. Nichols & Company, Inc., an independent contractor, was in truth and in fact an effort and attempt to evade the provisions of the Federal Employers Liability Act; that Defendant, Texas & Pacific Railway Company, at all times mentioned in this petition, had the right to control the details and the manner, means and method by which W. H. Nichols & Company, Inc. performed said work.

V.

That on or about the 20th day of August, 1952, a part of the work under the contracts above mentioned was being performed on Defendant's right-of-way at a point Northwest of the intersection of Ledbetter Drive and Highway No. 80, in Dallas, Dallas County, Texas; that at such point, Defendant, Texas & Pacific Railway Company, owned and operated double railway tracks, which tracks constituted its main line and over which said Defendant operated its fast passenger and freight trains; that such tracks run in a generally East and West direction; that on said date, Claude Baker, deceased, was working as a member of a crew which was performing said work heretofore referred to, and on said date, was operating a "mudjack" machine which pumped cement and mud into Defendant's roadbed; that said machine was situated on the South side of the roadbed near Defendant's East bound tracks located in a restricted area protected by warning flags; that at about 8:35 o'clock A.M. on said date, Claude Baker, deceased, was engaged in dumping a sack of cement in the "mudjack" machine when one of Defendant's trains approached from the East, traveling West; that said train was on the far track from deceased, Claude Baker, and constituted no [fol. 6] hazard to him, so he continued with his work, that at such time as he was standing near the South rail of the East bound track with his back toward the West and his attention attracted toward the train traveling on the West bound or North tracks, there approached from behind an-

other train operated by Defendant's agents, servants and employees, on the South tracks traveling East as (sic) a fast and dangerous rate of speed under the circumstances then existing, to-wit, at a rate of speed of approximately 65 miles per hour; that Defendant's agents, servants and employees in charge thereof were negligently operating said train in that they were not keeping a proper lookout or ringing the bell or sounding the whistle or giving any other signal of warning of its approach although deceased, Claude Baker, and his co-workers were known by Defendant's agents, servants and employees to be working at said point; that said East bound train approached the point where the deceased Claude Baker, was working at a time when the West bound train was passing said point and before the deceased, Claude Baker had stepped to a place of safety and while he was in said dangerous position, said East bound train struck the said Claude Baker, deceased, while he was performing his work with terific (sic) force, hurling him through the air and into some water tanks some water tanks (sic) some ten feet away, whereby he was caused to receive fatal injuries from which he died approximately one hour later.

VI.

That at all times mentioned herein, Defendant owned, maintained and operated a line of railway tracks over which it operated locomotives, passenger and freight cars and other equipment unsed (sic) in the movement and [fol. 7] transportation of interstate commerce, to-wit, transporting freight and passengers for hire from within the State of Texas to within and between other states of these United States.

VII.

That on the occasion in question, Claude Baker, deceased, was engaged in performing work for Defendant, Texas & Pacific Railway Company, in the furtherance of interstate commerce, and was performing work so closely and substantially affecting interstate commerce as to entitle Plaintiff and her children to the benefits of the Federal Em-

ployers Liability Act, and so as to bring Claude Baker within its terms and provisions.

VIII.

That on the occasion in question, Defendant and its agents, servants and employees were guilty of negligence in each of the following respects;

(a) In operating said East bound train at a greater rate of speed then (sic) was reasonable and prudent under the existing conditions.

(b) In failing to blow the whistle or sound the horn on said East bound train.

(c) In failing to give Claude Baker, deceased, any warning of the approach of said East bound train.

(d) In failing to give Claude Baker, deceased, sufficient warning of the approach of said East bound train by continously (sic) sounding the whistle or horn until past the point where he was working.

(e) In failing to slacken or reduce the speed of said East bound train as it approached the point where Claude Baker was working.

(f) In operating trains at a high rate of speed in opposite directions at the same time where deceased, Claude [fol. 8] Baker was working.

(g) In that Defendant's employees in charge of said East bound train failed to keep a proper lookout.

(h) In failing to apply the brakes on said East bound train before striking the said Claude Baker, deceased.

(i) In failing to sooner apply the brakes on said East Bound train before striking the deceased, Claude Baker.

(j) In failing to keep said East bound train under such control that it could be stopped within a reasonable distance.

(k) In that Defendant's enginemen in charge of said East bound train violated Rule 909 of the rules issued by Defendant requiring enginemen to keep a constant lookout.

(l) In that the firemen of said East bound train violated Rule 923 issued by Defendant requiring him to keep a constant and vigilant lookout for obstructions while the train was running.

(m) In failing to issue train orders requiring Defendant's employees in charge of said East bound train to reduce the speed at the point where deceased, Claude Baker, was working.

(n) In that Defendant's employees in charge of said East bound train failed to obey train orders issued to them regarding speed restrictions and track conditions at said point, in violation of Rule 220a issued by Defendant.

(o) In violating Rule 10 (f) issued by Defendant, reading as follows:

> "10 (f) When the condition of the track or structures require that the speed of trains be restricted, a yellow [fol. 9] signal will be displayed on the engineman's side of the track 3500 feet in each direction from the point where speed restriction becomes effective, and a green signal on the engineman's side of the track at the point where normal speed may be resumed."

by failing to display a yellow signal at said point although the track conditions were such under the circumstances as to reasonably require speed of Defendant's trains to be reduced.

(p) In that Defendant's agents, servants and employees in charge of said East bound train failed to heed "slow" signals or caustion (sic) signs which were displayed at the point where deceased, Claude Baker, was working by reducing the speed of said train.

(q) In operating said Eastbound train at a rate of speed in excess of fifteen miles per hour where yellow caution signals had been displayed, all in violation of Rule 10(f) issued by Defendant.

(r) In that Defendant's enginemen in charge of said East bound train violated that portion of Rule 919 of the

rules issued by Defendant requiring them on all occasions to be vigilant and cautious, not entrusting alone to signals or rules for safety.

(s) In that the Defendant's enginemen in charge of said engine failed to sound a series of short blasts of the whistle as a warning to deceased as required by Rule 14 (q) issued by Defendant.

(t) In failing to furnish the deceased a reasonably safe place to work.

[fol. 10] That each and all of said acts of negligence, as above set forth, were the direct and proximate cause of the fatal injuries sustained by Claude Baker, deceased; that if said acts of negligence were not singly the direct and proximate cause of said injuries, then Plaintiffs allege in the alternative that said acts of negligence were singly and collectively the direct and proximate cause of said fatal injuries and the damages suffered by Plaintiffs on the occasion in question.

IX.

With respect to Defendant's said locomotive and train, Claude Banker, (sic) deceased, occupied a posititon (sic) of danger and peril as said train approached the point where he was working; that Defendant and its agents, servants and employees operating said train, discovered and realized the periolous (sic) position of the said Claude Baker, deceased, with respect to the approaching train in time, so that by the exercise of ordinary care in the use of all the means at their command, to have aboided (sic) said fatal injury, with safety to Defendant's agents, servants and employees and other persons occupying said train; that after Defendant, its agents, servants and employees saw and realized such perilous situation of the said Claude Baker, deceased, they could have avoided said fatal injury by stopping said train or checking the speed of same or by sounding a sufficient signal of warning, but notwithstanding said facts, Defendant, its agents, servants and employees wholly failed to do any of said things, and failed to do anything to avoid said fatal injury, but continued

to heedlessly operate said train at said high, dangerous and excessive rate of speed until it crashed into the said [fol. 11] Claude Baker, deceased, as aforesaid; that said conduct on the part of Defendant, its agents, servants and employees operating said train was negligence and was a direct and proximate cause of said fatal injury.

X.

That at the time of his death the said Claude Baker, deceased, was a strong, robust and healthy man, 56 years of age, with a reasonable life expectancy of 17.37 years; that he was earning and capable of earning an average of $50.00 per week and would have continued to earn said sum of money, or a larger sum for many years, but for his untimely death; that in addition to working for wages, he also worked as a farmer; that he contributed all of his earnings to the support, maintenance and upkeep of his family and would have continued to do so had he lived; that he had, since his marriage to Plaintiff, cared for and supported his family in a manner suitable to his station in life; that the said Claude Baker owned no property at the time of his death and was dependent upon his earnings for the support of himself and his family; that Plaintiff and her children, before Claude Baker's death, were entirely dependent upon him for their maintenance and had he lived he would have provided for the education of his children; that Plaintiff, Dovie Ray Baker, is unable to properly support herself and her children and give them the education they need; that the said Claude Baker, deceased, was a devoted and affectionate father and husband and rendered many personal services to Plaintiff and their children, which were of pecuniary value to them and had he lived, he would have continued to do so.

Wherefore, on account of the untimely death of the said [fol. 12] Claude Baker, Dovie Ray Baker, and her minor children, Bobby Glen Baker, Claudette Baker and Olita Fay Baker, have sustained actual damages in the sum of $75,000.00, which was the direct and proximate result of the negligent acts of the Defendant, Texas & Pacific Railway Company, and its agents, servants and employees on the occasion in question.

XI.

That said train struck Claude Baker with great force, hurling him through the air and into some water tanks about ten feet away, whereby he was caused to sustain crushing injuries, particularly to his internal organs; that said Claude Baker survived all of said injuries for a period of approximately one hour, during which time he suffered great pain, shock and mental anguish, and was in such a state of pain, shock and mental anguish until his death.

Had Claude Baker lived he would have been entitled to recover damages against Defendant for the conscious pain, agony and suffering inflicted upon him by Defendant. Upon his death that right survived to the administratrix of his estate. For such pain and suffering Defendant should be compelled to respond in damages in the sum of $5,000.00.

Wherefore, Plaintiff Dovie Ray Baker as administratrix of the estate of Claude Baker, deceased, prays judgment against Defendant for the sum of $5,000.00.

XII.

That by reason of the said Claude Baker, deceased, it was necessary for Defendant Dovie Ray Baker, as administratrix of the estate of Claude Baker, deceased, to incur reasonable funeral bills on account of the death of her husband in the sum of $545.00; that the charges made there- [fol. 13] for were fair and reasonable and were the usual and customary charges for like and similar services for a person in Plaintiff's station in life at the time the same were received.

Wherefore, Plaintiff Dovie Ray Baker, as administratrix of the estate of Claude Baker, deceased, has suffered damages in the sum of $545.00.

XIII.

If Plaintiff, Dovie Ray Baker, be mistaken in alleging that Claude Baker, deceased, on the occasion in question was employed by Defendant, Texas & Pacific Railway Company, within the meaning of the terms and provisionso (sic) of the Federal Employers Liability Act, then in the alterna-

tive, Plaintiff, Dovie Ray Baker, as administratrix of the estate of Claude Baker, deceased, individually and as next friend for her minor children, Bobby Glen Baker, Claudette Baker and Olita Fay Baker, alleges that the said Claude Baker, deceased, at the time of his death was employed by W. H. Nichols & Company, Inc., which company was performing work for the Defendant, Texas & Pacific Railway Company under said contract as hereinbefore alleged and Plaintiffs adopt the allegations set out in Paragraphs, I, II, V, VIII, IX, X, XI and XII, of this petition and say that on the occasion in question Defendant and its agents, servants and employees were guilty of negligence toward Claude Baker, deceased, in each of the respects set out in in (sic) subdivisions (a) through (t) of Paragraph VIII, and in the respects set out in Paragraph IX, which acts of negligence were the proximate cause of the fatal injuries of Claude Baker, deceased, and Plaintiffs as the sole and exclusive beneficiaries of the said Claude Baker, deceased, under the Laws of Texas, are entitled to recover damages [fol. 14] for his wrongful death.

XIV.

Plaintiffs further pleading in the alternative, only if it be found Claude Baker deceased, was not subject to the terms and provisions of the Federal Employers Liability Act, say that this paragraph of the petition is addressed to the court only and is not to be read to the jury and Plaintiffs here and now assert their right to require that the facts disclosed in this paragraph and the recitation of the prayer in reference thereto, should not be brought out at the trial in the presence of the jury;

Plaintiffs further allege that at the time of the fatal injuries of the said Claude Baker, deceased, as hereinbefore alleged, he was an employee of W. H. Nichols & Company, Inc. and was then eligible under the Workmen's Compensation Law of Texas, to become a subscriber under the meaning of the Workmen's Compensation Law of Texas, and had become such subscriber, and it was carrying with Employers Mutual Liability Insurance Company of Wisconsin a policy of Workmen's Compensation insurance in

accordance with the terms and provisions of the Workmen's Compensation Act of Texas, covering all employees of the said W. H. Nichols & company, Inc., including the deceased, Claude Baker; that pursuant to its obligations under said policy, Employers Mutual Liability Insurance Company of Wisconsin recognized its liability to these Plaintiffs and has made a lump sum settlement approved by the Industrial Accident Board of Texas with these Plaintiffs of its liability to them for workmen's compensation benefits in the sum of $7,919.94.

By virtue of the Workmen's Compensation Act of the [fol. 15] State of Texas, Employers Mutual Liability Insurance Company of Wisconsin is subrogated to the rights of these Plaintiffs to the extent of such payments made by it and out of any amount recovered by Plaintiffs herein, is entitled to be reimbursed and to have judgment for said sum of $7,919.94.

Wherefore, premises considered, Plaintiffs pray that Defendant be duly cited to appear and answer this petition; that upon final hearing, Plaintiffs have judgment for their damages in the sum of $75,000.00 to be apportioned between them in such shares as the Court and Jury may find just, together with interest and cost of suit and that out of said amount recovered, if it be found Claude Baker, deceased, was not an employee of Defendant, Texas & Pacific Railway Company, Employers Mutual Liability Insurance Company of Wisconsin have set aside and apportioned to it the sum of $7,919.94; that Plaintiff, Dovie Ray Baker, as administratrix of the estate of Claude Baker, deceased, recover judgment for damages in the sum of $5,545.00; that Plaintiffs recover their costs and have such other and further relief, general and special, to which they may show themselves to be justly entitled, either in law or in equity.

/s/ Russell M. Baker, Of; Caldwell, Baker and Jordan, 305 Medical Arts Bldg., Dallas, Texas, Attorneys for Plaintiffs.

[File endorsement omitted]

[fol. 16]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S THIRD AMENDED ORIGINAL ANSWER—
Filed October 1, 1956

To the Said Honorable Court:

Now Comes Texas and Pacific Railway Company after having obtained leave of Court to do so, and subject to its Plea In Abatement, files this its Third Amended Original Third Answer in reply to Plaintiff's Second Amended Original Petition, thereby showing the Court and jury the following:

I.

Defendant specially excepts to Plaintiff's Second Amended Original Petition as a whole because the file mark thereon shows that same was filed on the day of September, 1956; that the occurrence of which plaintiff complains occurred on or about August 20, 1952; that plaintiff in the first twelve numbered paragraphs of her petition seeks to recover under the provisions of the Federal Employers Liability Act; that such cause of action is filed for the first time more than treee (sic) (3) years after the date of the occurrence complained of; and that under the terms of the Federal Employers Liability Act said cause of action which plaintiff attempts to allege has been destroyed and is barred by the three year limitation pro-
[fol. 17] vision of the Federal Employers Liability Act. Of this exception, defendant prays judgment of the Court.

II.

Defendant specially excepts to that portion of Paragraph IV reading as follows:

"* * * that said work was a part of the regular maintenance and upkeep of Defendant's line of railway tracks then in use in interstate commerce and said contract,

while purporting to constitute W. H. Nichols & Company, Inc. an independent contractor, was in truth and in fact an effort and attempt to evade the provisions of the Federal Employers Liability Act; that Defendant, Texas & Pacific Railway Company, at all times mentioned in this petition, had the right to control the details and the manner, means and method by which W. H. Nichols & Company, Inc. performed such work."

Because no facts are alleged which would legally prohibit this defendant from entering into a contract with W. H. Nichols & Company to perform the work in question, that is, there are no facts alleged which would prohibit the delegation of such work by defendant to an independent contractor. Further, no facts are alleged to support the conclusion that the contract was an effort to evade the provisions of the Federal Employers Liability Act, and such allegation is so vague and indefinite that this defendant cannot anticipate the character of proof to be met and properly prepare its defense. Further, the allegation that the contract was an effort to evade the provisions of [fol. 18] the Federal Employers' Liability Act is highly prejudicial and is calculated to inflame the jury against this Defendant by giving it the impression that this defendant is in some manner undertaking to cheat its employees when there is no basis in fact alleged in the petition to support such allegation. Of this exception, defendant prays judgment of the Court.

II.

Defendant specially excepts to all of Paragraph VII because no facts are alleged that would constitute deceased an employee of this defendant. Therefore, as a matter of law, deceased was not covered by the provisions of the Federal Employers Liability Act. Such allegation, therefore, is entirely irrelevant and immaterial, and furthermore the allegation is so vague and indefinite that it wholly fails to apprise this defendant of the character of proof to be met so that it cannot properly prepare its defense. Of this exception, defendant prays judgment of the Court.

IV.

Defendant would show that Paragraph VIII of Plaintiff's Second Amended Original Petition is substantially the same as Paragraph Vi (sic) of Plaintiff's First Amended Original Petition and for brevity, defendant here and now incorporates by reference as though same were re-copied herein and leveled at Paragraph VIII of Plaintiff's Second Amended Original Petition, its exceptions to sub-paragraphs (a), (b), (c), (d), (e), (f), (h), (i), (j), (k), (l), (m), (n), (o), (p) and (q), which such exceptions are contained in Paragraphs III through XVIII, both inclusive, of Defendant's Second Amended Original Answer. Of these exceptions, defendant prays judgment of the Court.

[fol. 19]

V.

Defendant specially excepts to sub-section (r) of Paragraph VIII because the violation of a company rule in law is not negligence and further, because the rule referred to is so vague and indefinite and covers so many different conceivable acts and omissions that this defendant cannot anticipate the character of proof to be met and properly prepare its defense. Of this exception, defendant prays judgment of the Court.

VI.

Defendant specially excepts to sub-section (s) of Paragraph VIII because same is repetitious and duplicitous of subsection (d) of Paragraph VIII and by such repetition will serve only to increase the importance of such allegations in the minds of the jury. Defendant further excepts to said sub-section (s) because it fails to specify which engine plaintiffs is referring to. Of these exceptions, defendant prays judgment of the Court.

VII.

Defendant specially excepts to sub-section (t) of Paragraph VIII because same constitutes a general allegation of negligence and fails to advise this defendant of its specific acts or omissions which caused the place in which

deceased was working to be an unsafe place to work. Defendant further excepts and objects to such allegation because it attempts to plead a higher duty imposed by law. Of this exception, defendant prays judgment of the Court.

VIII.

Defendant denies each and every, all and singular the allegations contained in Plaintiff's Second Amended Original Petition and demands strict proof thereof.

[fol. 20] IX.

Defendant speially (sic) denies that Claude Baker was an employee of this defendant at the time and on the occasion in question. In this connection defendant would show that the plaintiff should not now be heard to contend before this Court and jury that Claude Baker was an employee of this defendant because of her former contentions and quasi judicial admissions befor (sic) a quasi judicial body, that is, the Industrial Accident Board of the State of Texas. In this connection, this defendant would show that the plaintiff, Dovie Ray Baker, has heretofore on or about August 25, 1952, filed with the Industrial Accident Board her notice of the fatal injury of Claude Baker and her claim for compensation for the death of Claude Baker, alleging in such instruments for the purpose of collecting workmen's compensation insurance that Claude Baker was an employee of W. H. Nichols & Company, Inc. at the time of his death and that he received his fatal injuries in the course and scope of his employment by the said W. H. Nichols & Company, Inc. Defendant would further show that on the basis of such allegations and on the basis of fact that the said plaintiff, Dovie Ray Baker, and her minor children, for whom she now brings this suit, have collected from Employers Mutual Liability Insurance Company of Wisconsin, the compensation insurer for W. H. Nichols & Company, Inc., the full benefits provided under the Workmen's Compensation Laws of the State of Texas for the death of Claude Baker, deceased. Defendant would show that by her action she has admitted the true facts, that is, that here (sic) husband was employed by said W. H.

Nichols & Company, Inc., and that having once collected the full benefits for the death of her husband, should not now be heard to say for the purpose of collecting other [fol. 21] money that he was an employee of a different employer, that is, that he was an employee of this defendant railroad.

X.

Defendant would further show the Court and jury that at the time and on the occasion in question, defendant's trial (sic) No. 21 was moving at a slow rate of speed in a westerly direction and as it approached the point of the accident in question was sounding its whistle and bell, and traveling in the opposite direction, that is, in an easterly direction, was defendant's train No. 6 which was likewise moving at a slow rate of speed and was sounding its whistle and bell. Deceased was a member of a crew of men employed by W. H. Nichols & Company, Inc., as independent contractors, to make certain repairs to the roadbed of defendant. Before the two trains above mentioned approached the point of the accident, deceased, as well as the other members of said crew, knew of their approach. As train No. 6 approached the point of the accident, the deceased was standing south of the south rail of the track on which train No. 6 was moving and was in a place of safety. Before the said train No. 6 reached the vicinity of deceased, the other members of the crew had hollered at him in warning of the approach of said train. In spite of such knowledge and warning, when the front of the engine of train No. 6 was within approximately ten feet of deceased, deceased left his place of safety and turned, facing said engine No. 6 and walked into the paty (sic) of same, receiving the injuries resulting in the death here complained of.

XI.

Defendant would show the Court and jury that at the time and on the occasion complained of, deceased was guilty of the following acts and omissions of negligence:

(a) In failing to keep a proper lookout for his own safety.

(b) In voluntarily leaving his place of safety and stepping into the path of the oncoming engine and train. *When he knew or should have known of its approach.*

(c) In failing to heed the warning of danger afforded him by the presence of the tracks themselves upon which the train was approaching.

(d) In failing to heed the warning of his fellow crew members concerning the approach of train No. 6.

(e) In failing to heed the warning afforded him by the whistle and bell on train No. 6.

East (sic) of such acts and omissions, specially and collectively, was a proximate cause of the injuries and deathe (sic) complained of. Each of such acts and omissions alternately was the sole proximate cause of the injuries and death complained of.

XII.

For further answer, and in the alternative, defendant says that the accident in question was wholly unavoidable insofar as it is concerned.

Wherefore, Premises Considered, defendant prays that plaintiff take nothing by her suit and that defendant be allowed to go hence without day and with its costs, and for such other and further relief, special and general, in law or in equity, to which it may be justly entitled.

Robertson, Jackson, Payne, Lancaster and Walker,
By /s/ D. L. Case, Attorneys for Defendant, 2800 Republic Bank Building.

[fol. 23] Dallas, Texas

A copy of the above and foregoing Third Amended Original Answer has been mailed on the day of September, 1956, to Caldwell, Baker and Jordan, 432-B

Medical Arts Building, Dallas, Texas, Attorneys for plaintiff.

[File endorsement omitted]

[fol. 24]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

No. 73,418-D

[Title omitted]

PRE-TRIAL ORDER—October 1, 1956

On This the 1st day of October, 1956, came on to be heard the exceptions to Defendant's Third Amended Original Answer contained in Plaintiff's First Supplemental Petition, and came on to be heard the Plea in Abatement of the defendant and the special exceptions to Plaintiff's Third Amended Original Petition contained in Defendant's Third Amended Original Answer, and the Court having considered such special exceptions and such Plea in Abatement and being of the opinion that they should each be overruled;

It is, therefore, Ordered, Adjudged and Decreed that each such special exceptions and such Plea in Abatement above referred to be, and they are hereby in all things overruled, to all of which plaintiffs and defendant respectively then and there excepted.

/s/ Paul Peurifoy, Judge.

[File endorsement omitted]

[fol. 25]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S FIRST TRIAL AMENDMENT—
Filed October 4, 1956

To the Said Honorable Court:

Now Comes the defendant after having obtained leave of Court to do so and files this his First Trial Amendment, thereby amending its Third Amended Original Answer as follows:

I.

Add Paragraph XIII to read as follows:

"Defendant would show in the alternative that if it is mistaken and the Court should find and hold that Claude Baker was an employee of this defendant, that then and in that event, Employers Mutual Liability Insurance Company of Wisconsin is not entitled to be subrogated by reason of payments of workmens compensation paid to plaintiffs because if Claude Baker was an employee of this defendant, such company did not owe these plaintiffs any payment of compensation and by making such payment it was a pure volunteer."

Respectfully submitted,

Robertson, Jackson, Payne, Lancaster and Walker,
By /s/ D. L. Case, Attorneys for Defendant.

[File endorsement omitted]

[fol. 26]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S PLEA IN ABATEMENT—Filed October 1, 1956

To the Said Honorable Court:

Now Comes defendant and moves the Court to abate and dismiss that portion of plaintiff's cause of action set forthe (sic) in her last amended petition and as grounds therefor would show the following:

I.

The accident which is the basis of this suit occurred on or about about (sic) August 20, 1952. Plaintiff originally filed suit individually and as Next Friend for her minor children. In her last amended pleading she filed suit as Administratrix of the Estate of the deceased. She undertakes to recover under the terms of the Federal Employers Liability Act. Her last amended petition is the first pleading in which she has filed suit in her respective capacity. Such petition was filed more than four years following the date of the fatal injuries received by deceased. Defendant would show that she has been qualified as Administratrix of the Estate for approximately one year. Defendant would also show that this cause was tried more than a year ago and within the three year statutory limitation period for Federal Employers Liability Act cases and that during the course of such trial this defendant made many objections pointing out the want of capacity of Dovie Ray Baker to individually and as Next Friend maintain suit under the Federal Employers Liability Act.

[fol. 27]

II.

Defendant would show that the cause of action which plaintiff alleges under the Federal Employers Liability Act is barred by the limitations contained in such Act. Defendant would further show that even after being qualified as Administratrix, the plaintiff has not used that degree

of diligence which might otherwise excuse her failure to have brought the suit in her proper capacity.

Wherefore, that portion of her suit under the Federal Employers Liability Act should be abated and dismissed.

Respectfully submitted,

Robertson, Jackson, Payne, Lancaster and Walker,
By /s/ D. L. Case.

[File endorsement omitted]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFFS' FIRST SUPPLEMENTAL PETITION IN ANSWER TO DEFENDANT'S THIRD AMENDED ORIGINAL ANSWER—
Filed October 1, 1956

To Said Honorable Court:

Now comes the Plaintiffs in the above styled and numbered cause and in answer to Defendant's Third Amended Original Answer, file this their First Supplemental Petition and say:

I.

Plaintiffs except to the allegations contained in Paragraph IX. of said answer because the same constitute no [fol. 28] defense to Plaintiffs' cause of action and no facts are alleged which would constitute an estoppel or prevent these Plaintiffs from asserting a claim against Defendant based upon the true facts in this case. That such allegations are highly prejudicial to the rights of Plaintiffs and should be stricken; alternatively Plaintiffs show that the allegations in such Paragraph should not be read in the presence of the jury, particularly that portion of said Paragraph wherein it is alleged that Plaintiff Dovie Ray Baker and her minor children collected from Employers Mutual Liability Insurance Company the full benefits provided under

the Workmen's Compensation Law of the State of Texas for the death of Claude Baker, deceased.

Of which special exception Plaintiffs pray judgment of the Court.

II.

Plaintiffs except to the allegations of Paragraph XI, Sub-Section (b), for the reason that the same is not an ultimate issue and an affirmative finding thereon would not constitute a defense to Plaintiffs claim and because it is not alleged that the deceased Claude Baker was aware of the approach of the oncoming train at the time he left a place of safety and stepped into the path of the oncoming engine and train; that in the absence of such allegation, there would be no negligence on the part of Claude Baker, deceased, especially in the absence of other allegations showing that he had reason to known as an ordinary prudent person that another train was approaching on the track near which he was standing.

Of which special exception Plaintiffs pray judgment of the Court.

III.

Plaintiffs except to the allegations of Paragraph XI, Sub-Section (c) because the same is but a general allegation [fol. 29] of negligence, is not an ultimate issue and is too vague, indefinite and uncertain; that as a matter of law the presence of the tracks near which Plaintiff was standing and upon which the train was approaching would not constitute a warning to the deceased in the absence of allegations showing that Claude Baker, deceased, knew, or in the exercise of ordinary care, should have known of the approach of the train on the track near which he was standing.

Of which special exception Plaintiffs pray judgment of the Court.

IV.

Plaintiffs except to the allegations in Paragraph XI reading as follows:

"Each of such actions and omissions alternately was the sole proximate cause of the injuries and death complained

of" for the reason that if it be found that this is an ordinary common law negligence action and the Federal Employers Liability Act does not apply, such allegation is surplusage and a finding of proximate cause with respect to the allegations of Paragraph XI, Sub-Section (a) through (e) would constitute a defense to Plaintiffs' claim; that if it be found upon the trial of such cause that this is not an ordinary common law negligence action but is governed by the terms and provisions of the Federal Employers Liability Act, then such allegation is but an attempt to plead non-negligence; is mere surplusage, not an ultimate issue and should be stricken.

Of which special exception Plaintiffs prays judgment of the Court.

V.

For further answer herein Plaintiffs allege that at the [fol. 30] time they made claim for compensation under the Workmen's Compensation Law because of the death of Claude Baker, deceased, they were not aware of all of the true facts in this case; that subsequent investigation by Plaintiffs' attorneys disclosed the true facts which Plaintiffs' believe to be that W. H. Nichols & Company, Inc., was not in truth and in fact an independent contractor, but that the Defendant Texas and Pacific Railway Company, had the right to control the manner in which the details of the work performed so as to bring the deceased Claude Baker within the terms and provisions of the Workmen's Compensation Law of the State of Texas.

VI.

Plaintiffs deny all and singular the allegations in said Third Amended Original Answer and demand strict proof of same.

Wherefore, premises considered, Plaintiffs pray as in their Third Amended Original Petition.

/s/ Russell Baker, Of: Caldwell, Baker and Jordan, 305 Medical Arts Building, Dallas, Texas, Attorneys for Plaintiffs.

[File endorsement omitted]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

PLEA OF INTERVENTION—Filed October 4, 1956

[fol. 31] To the Honorable Judge of Said Court:

Comes Now Employers Mutual Liability Insurance Company of Wisconsin, and with leave of Court files this its Petition in Intervention in the above styled and numbered cause, and for cause of action Intervenor respectfully shows the Court as follows:

1.

That heretofore, to-wit, on or about the 20th day of August, 1952, Claude Baker, being then and there in the course of his employment for W. H. Nichols & Company, while so working in Dallas County, Texas, was seriously injured and killed in an accident described in Plaintiffs' pleadings on file herein.

2.

That at the time of the injury to and death of Claude Baker, W. H. Nichols & Company was the holder of a duly executed and delivered policy of Workmen's Compensation insurance, issued and delivered to it by Intervenor, Employers Mutual Liability Insurance Company of Wisconsin, operating in Texas by virtue of the pertinent Texas Insurance Statute, and in accordance with the Workmen's Compensation Act of Texas covering all employees of the said W. H. Nichols & Company, including Claude Baker.

3.

That Plaintiffs are the legal beneficiaries and heirs of Claude Baker, Deceased, and were the beneficiaries under the Workmen's Compensation Act of the said Claude Baker.

4.

That by reason of the said injuries to and death of Claude Baker in the course of his employment for W. H. Nichols & Company, Intervenor became liable to pay Workmen's [fol. 32] Compensation death benefits to Plaintiffs herein, and recognized its liability and paid Plaintiffs the sum of Seven Thousand Nine Hundred and Nineteen and 94/100 ($7,919.94) Dollars, in accordance with the provisions of the Workmen's Compensation Act of Texas.

5.

Should Plaintiffs herein recover of and from the Defendant Texas & Pacific Railway Company, then by virtue of the Workmen's Compensation Act of the State of Texas, Intervenor is subrogated to the rights of Plaintiffs herein, to the extent of payments made by Intervenor under the Workmen's Compensation Act, plus the reasonable amount of attorneys' fees and other expense of prosecuting this action, and Intervenor is entitled to have judgment out of any recovery made herein for such amounts.

6.

Intervenor would further show that this intervention is being prosecuted by E. J. Kolb, an Attorney of Dallas, Dallas County, Texas, duly licensed and practicing in Dallas, Dallas County, Texas, in behalf of the said Intervenor, and that the reasonable value of his services herein is an amount equivalent to one-third (⅓) of the amount to be recovered by Intervenor as reinbursement (sic) for its payment to Plaintiffs, and that said amount is in the sum of $2,639.98.

7.

In the alternative, Intervenor alleges that in the event that it be found that Claude Baker was not an employee of W. H. Nichols & Company, but rather was an employee of Texas & Pacific Railway Company, that the payment of the said $7,919.94 to Plaintiffs herein by virtue of the Workmen's Compensation Act of Texas by Intervenor, was [fol. 33] made by mutual mistake, and that Intervenor is

therefore entitled to recover said sum, with interest thereon at the rate of 6% per annum, from the said Plaintiffs herein out of any recovery made or to be made by them from the Texas & Pacific Railway Company; that Intervenor is further entitled to such recovery by reason of the unjust enrichment of Plaintiffs; and further that Intervenor is entitled to such recovery herein on the basis of estoppel.

Wherefore, premises considered, Intervenor, Employers Mutual Liability Insurance Company of Wisconsin, prays that it have recovery herein of and from Plaintiffs and Defendant Texas & Pacific Railway Company, in the sum of Ten Thousand Five Hundred and Fifty-Nine and 92/100 ($10,559.92) Dollars, together with all legal interest and cost of suit, and for such other relief at law or in equity to which it may show itself justly entitled.

/s/ E. J. Kolb, Attorney for Intervenor.

[File endorsement omitted]

[fol. 48]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

CHARGE OF COURT—Filed October 5, 1956

Ladies and Gentlemen of the Jury:

This case is submitted to you upon special issues in the form of questions, which you will answer as you find the facts to be.

"Preponderance of the evidence," as that term is used in this charge, means the greater weight and degree of credible testimony before you,

"Negligence," as that term is used in this charge, means the failure to exercise ordinary care.

"Ordinary care," as that term is used in this charge, means that degree of care which would be exercised by a person of ordinary prudence, under the same or similar circumstances.

"Proximate cause," as that term is used in this charge, means that cause which, in its natural and continuous sequence, unbroken by any new independent cause, produces a result, and without which cause, such result would not have occurred, and which result, or some similar result, would have been reasonably foreseen by a person of ordinary care in the light of the attending circumstances.

There may be more than one proximate cause of a result.

"Sole proximate cause." as that term is used in this charge, means the only proximate cause, There can be but one sole proximate cause.

[fol. 49] "New independent cause," as that term is used in this charge, means the act or omission of an independent agency, which breaks the causal connection between the original cause and the result complained of, and which, in itself, becomes the immediate cause of such result.

"Proper lookout," as that term is used in this charge, means such a lookout as a person of ordinary care would have kept under the same or similar circumstances.

"Proper control," as that term is used in this charge, means, such control as a person of ordinary care would have had under the same or similar circumstances.

"Unavoidable accident," as that term is used in this charge, means an event that happens without having been proximately caused by the negligence of any party to it on the part of the operatiors (sic) of the train or Clause (sic) Baker.

You are instructed that before any special issue submitted to you may be considered as answered that you must unanimously agree on such answer from a preponderance of the evidence.

During your deliberations on this case, you will not consider, discuss or relate any matters not in evidence before you, and you will not take into consideration the effect your answers may have on who wins or loses this case, but merely answer the questions as you may find the facts from the evidence before you and under the definitions and instructions given you herein.

Special Issue No. 1

Do you find from a preponderance of the evidence that [fol. 50] the enginemen of Defendant's Eastbound train

failed to exercise ordinary care in the rate of speed at which he was operating said train on the occasion in question?
Answer Yes or No.
Answer No

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same.

Special Issue No. 2

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the foregoing special issue, was a proximate cause of the death of Claude Baker?
Answer Yes or No.
Answer .....

Special Issue No. 3

Do you find from a preponderance of the evidence that the enginemen of Defendant's eastbound train failed to keep a proper lookout on the occasion in question?
Answer Yes or No.
Answer No

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer the same:

Special Issue No. 4

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the foregoing special issue, was a proximate cause of the death of Claude Baker?
Answer Yes or No
Answer .....

[fol. 51] Special Issue No. 4-A

Do you find from a preponderance of the evidence that the enginemen of Defendant's eastbound train failed to give a warning of the approach of said train on the occasion in question?
Answer Yes or No.
Answer No

If you have answered the foregoing special issue yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 4-B

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the foregoing special issue, was negligence?
Answer Yes or No
Answer .....

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 4-C

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the foregoing special issue was proximate cause of the death of Claude Baker?
Answer Yes or No.
Answer .....

Special Issue No. 5

Do you find from a preponderance of the evidence that the enginemen of Defendant's eastbound train failed to exercise ordinary care in warning if any of the said train's approach to the scene of the accident on the occasion in question?
Answer Yes or No
[fol. 52] Answer Yes

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 6

Do you find from a preponderance of the evidence that such ~~(Illigible)~~ failure, if any you have found in answer to the foregoing special issue, was a proximate cause of the death of Claude Baker?
Answer Yes or No
Answer Yes

Special Issue No. 7

Do you find from a preponderance of the evidence that the enginemen of Defendant's eastbound train failed to exercise ordinary care in applying the brakes on said train on the occasion in question?
Answer Yes or No.
Answer No

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 8

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the foregoing special issue, was a proximate cause of Claude Baker's death.
Answer Yes or No.
Answer .....

Special Issue No. 9

Do you find from a preponderance of the evidence that the enginemen in charge of defendant's eastbound train failed to reduce the speed of said train to twenty miles per hour in the restricted area? ~~Illegible~~
[fol. 53] Answer Yes or No.
Answer No.

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 10

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the preceding special issue, was negligence?
Answer Yes or No
Answer .....

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 11

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the foregoing special issue, was proximate cause of the death of Claude Baker?

Answer Yes or No.

Answer .....

Special Issue No. 16

Do you find from a preponderance of the evidence that immediately before he was struck by defendant's eastbound train, Claude Baker was in a position of peril?

By the Term "position of peril", as used in the foregoing special issue, is meant: "It does not mean that it is necessary that bodily injury will certainly be suffered by a person. A person is in a 'position of peril' whenever he is pursuing a course which will probably terminate in serious bodily injury to him and from which he cannot, or will not, [fol. 54] in all probability, extricate himself."

Answer Yes or No.

Answer Yes

If you have answered the foregoing special issue Yes, then answere (sic) the following special issue; otherwise do not answer same:

Special Issue No. 17

Do you find from a preponderance of the evidence that defendant's ecmployees (sic) operating said eastbound train on the occasion in question discovered the perilous situation, if any, of the deceased, Claude Baker, in time so that, by the exercise of ordinary care in the use of all the means at hand, consistent with safety to them, said passengers and said train, they could have avoided striking Claude Baker, deceased?

You are instructed that a person discovers the perilous situation of another person whenever it reasonably appears to such person, from the facts and circumstances within his knowledge, that the other person is pursuing a course, and will probably pursue it to the end, which will probably result in serious bodily injury to him and from which he cannot, or will not, in all probability, extricate himself.

Answer Yes or No.
Answer No

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 18

Do you find from a preponderance of the evidence that defendant's employees operating said eastbound train, after they discovered the said Claude Baker, deceased, in a posi-[fol. 55] tion of peril, if you have so found that they did, failed to exercise ordinary care in the use of all the means at hand, consistent with their own safety, their passengers and said train, to avoid striking Claude Baker?
Answer Yes or No.
Answer .....

If you have answered the foregoing special issue, then answer the following special issue; otherwise do not answer same:

Special Issue No. 19

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the foregoing special issue, was a proximate cause of the death of Claude Baker?
Answer Yes or No.
Answer .....

Special Issue No. 20

Do you find from a preponderance of the evidence that the death of Claude Baker was not the result of an unavoidable accident? Let the form of your answer be, "It was the result of an unavoidable accident", or, "It was not the result of an unavoidable accident".
Answer It was not the result of an unavoidable Accident

Special Issue No. 21

Do you find from a preponderance of the evidence that at the time and on the occasion in question Claude Baker failed to keep a proper lookout for his own safety?
Answer, "He failed", or, "He did not fail".

Answer He failed

If you have answered the foregoing special issue "He [fol. 56] failed", then answer the following special issue; otherwise do not answer same:

Special Issue No. 22

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the foregoing special issue, was a proximate cause of the death of Claude Baker?

Answer Yes or No.

Answer Yes

Special Issue No. 23

Do you find from a preponderance of the evidence that the enginemen on defendant's eastbound train in question gave a warning by whistle and bell of the approach of said train to persons at the location where Claude Baker was situated at the time and on the occasion in question?

Answer Yes or No.

Answer No

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 24

Do you find from a preponderance of the evidence that Claude Baker failed to heed such warning, if any?

Answer Yes or No

Answer .....

If you have answered the foregoing special issue Yes, then you will answer the following special issue; otherwise do not answer same:

Special Issue No. 25

Do you find from a preponderance of the evidence that such failure, if any you have found, was negligence?

[fol. 57] Answer Yes or No.

Answer .....

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 26

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause of Claude Baker's death?
Answer Yes or No.
Answer .....

Special Issue No. 27 ~~23~~

Do you find from a preponderance of the evidence that prior to the time defendant's eastbound train reached the vicinity of Claude Baker he was in a place of safety?
Answer Yes or No.
Answer Yes

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 27A

Do you find from a preponderance of the evidence that immediately prior to the time he was struck by defendant's eastbound train Claude Baker stepped from a place of safety into the parth (sic) of said eastbound train when he knew or should have known of the approach of the Eastbound train?
Answer Yes or No.
Answer Yes

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

[fol. 58] Special Issue No. 28

Do you find from a preponderance of the evidence that such action of Claude Baker in stepping from a place of safety into the path of defendant's eastbound train, if you have so found, was negligence?
Answer Yes or No
Answer Yes

If you have answered the foregoing special issue Yes, Then answer the following special issue; otherwise do not answer same:

Special Issue No. 29

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the foregoing special issue, was proximate cause of the death of Claude Baker?
Answer Yes or No
Answer Yes

Special Issue No. 30

Do you find from a preponderance of the evidence that an employee or employees of W. H. Nichols and Company, Inc., gave warning of the approach of defendant's eastbound train?
Answer Yes or No
Answer No

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 31

Do you find from a preponderance of the evidence that at the time and on the occasion in question Claude Baker failed to heed the warning, if any given by an employee or employees of W. H. Nichols and Company, Inc., of the ap-
[fol. 59] proach of defendant's eastbound train?
Answer, "He failed" or "He did not fail".
Answer .....

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 32

Do you find from a preponderance of the evidence that the failure of Claude Baker to heed the warning, if any you have found, given by such other employee or employees of W. H. Nichols and Company, Inc., was negligence?
Answer Yes or No
Answer .....

If you have answered the foregoing special issue Yes, then answer the following special issue; otherwise do not answer same:

Special Issue No. 33

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the foregoing special issue, was a proximate cause of the death of Claude Baker?

Answer Yes or No.

Answer .....

Special Issue No. 34

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence will fairly and reasonably compensate the plaintiffs, Mrs. Dovie Ray Baker, and her minor children, Bobby Glen Baker, Claudett (sic) Baker, and Oleta Fay Baker, for the loss of pecuniary aid, if any, they would in reasonable probability have received from the deceased Claude Baker, had he lived?

By "pecuniary aid", is meant not only money, but every thing that can be valued in money, and, in the case of minor children includes the reasonable pecuniary value of the nurture, care, education and moral training, if any, you believe from a preponderance of the evidence they would have received from the deceased during their minority, had he lived.

And, in the case of the widow, "pecuniary aid" includes the reasonable pecuniary value, if any, of the counsel, protection and personal services, if any, you believer (sic) from the evidence she would have received from the deceased had he lived.

You are instructed that you may not consider and you must not allow plaintiffs anything by the way of consolation by reason of the death of the said Claude Baker, nor anything for any grief, sorrow or anguish caused by such death or the loss of his society and companionship.

~~You are further instructed that in connection with this special issue you may take the following into consideration~~; ~~Illebigle~~ (sic) ---------- answer by inserting the sum allowed, if any, or "None".

To Mrs. Dovie Ray Baker	$5000.00
To Bobby Glen Baker	5000.00
To Claudette Baker	8000.00
To Oleta Fay Baker	8000.00

Special Issue No. 35

What sum of money, if any, do you find from a preponderance of the evidence plaintiff, Dovie Ray Baker, was re-
[fol. 61] quired to expend for funeral and burial expenses because of the death of her husband, Claude Baker?
Answer in Dollars, if any, and cents, if any:
Answer $545.00.

Special Issue No. 36

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Claude Baker for the physical and mental pain and suffering, if any, which he suffered from the time of his injuries to his death?

Answer in dollars, if any, and cents, if any, otherwise answer "None".
Answer $1500.00

You are the sole judges of the facts proved; the credibility of the witnesses and of the weight and credit to be given to their testimony, but the law you will receive from the court, which is herein given you and be governed thereby.

After argument of counsel, you will retire to the jury room, select your own foreman and write your answer to the questions in the space provided after each question; your foreman will sign the form of verdict as shown below.

You are further instructed that while you are deliberating upon your verdict, you will not mention, nor refer to, any matter, fact or circumstance other than the evidence that has been produced in court, and the law as given you in the charge of the court, all of which I instruct you, you must strictly observe and obey.

/s/ Paul Peurifoy, Judge.

[fol. 62] We, the jury, have answered the above and foregoing questions as herein indicated and herewith return same into court as our verdict.

/s/ V. W. Chartrand, Foreman.

[File endorsement omitted]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

No. 73,418-D

DOVIE RAY BAKER

v.

TEXAS AND PACIFIC RAILWAY COMPANY

JUDGMENT—October 24, 1956

Be It Remembered that on the 1st day of October, 1956, at a regular term of this Court, there came on to be heard in due order the above entitled and numbered cause and thereupon came the plaintiffs in person and by and through their attorneys of record and came the defendant and cross-[fol. 63] plaintiff by and through its attorneys of record and came the cross-defendant, W. H. Nichols and Company by and through its attorney of record and all parties announced ready for trial; thereupon came a jury of good and lawful jurors, to-wit: V. E. Chartrand and eleven others who were duly tested, selected, impaneled and sworn, and the trial of this cause proceed with the reading of pleadings and the introduction of testimony until the 4th day of October, 1956, and the testimony was concluded on said date and the Court having found and concluded that the facts and the law are with the cross-defendant, W. H. Nichols and Company, withdrew the cause of action set forth in the third party cross-action from the jury and rendered judgment that cross-plaintiff, the Texas and Pacific Railway Company, take nothing against the cross-defendant, W. H. Nichols and Company; and the jury after

having retired and deliberated returned in open Court on the 5th day of October, 1956, their verdict and the Court having read the jury's verdict in open Court and in the presence of the jury and the respectives (sic) parties and having polled the jury as to whether the jury's verdict as read was the verdict of each of the jurors and the jurors each so signified, the Court thereupon accepted such verdict as the verdict of the jury. The verdict of the jury was as follows:

Apecial (sic) Issue

No. 1 Answer: No.

No. 2 Answer: Not answered.

No. 3 Answer: No

No. 4 Answer: Not answered.

No. 4-A Answer: No

[fol. 64] No. 4-B Answer: Not answered.

No. 4-C Answer: Not answered.

No. 5 Answer: Yes.

No. 6 Answer: Yes.

No. 7 Answer: No.

No. 8 Answer: Not answered.

No. 9 Answer: No.

No. 10 Answer: Not answered.

No. 11 Answer: Not answered.

No. 16 Answer: Yes.

No. 17 Answer: No.

No. 18 Answer: Not answered

No. 19 Answer: Not answered.

No. 20 Answer: It was not the result of an unavoidable accident.

No. 21 Answer: He failed.

No. 22	Answer: Yes		
No. 23	Answer: No.		
No. 24	Answer: Not answered.		
No. 25	Answer: Not answered.		
No. 26	Answer: Not answered.		
No. 27	Answer: Yes.		
No. 27-A	Answer: Yes.		
No. 28	Answer: Yes.		
No. 29	Answer: Yes.		
No. 30	Answer: No.		
No. 31	Answer: Not answered.		
No. 32	Answer: Not answered.		
No. 33	Answer: Not answered.		
No. 34	Answer:	To Mrs. Dovie Ray Baker	$5,000.00
		To Bobby Glen Baker	–5,000.00
		To Claudette Baker	–8,000.00
		To Oleta Fay Baker	–8,000.00
[fol. 65] No. 35	Answer: $545.00.		
No. 36	Answer: $1,500.00.		

And it appearing to the Court in response to the verdict of the jury the defendant, the Texas and Pacific Railway Company, is entitled to judgment; that the plaintiffs, Dovie Ray Baker, Administratrix of the Estate of Claude Baker, deceased, Dovie Ray Baker, individually and Dovie Ray Baker as next friend for her minor children, Bobby Glen Baker, Claudette Baker, Oleta Fay Baker, and the said minors, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and each of them, should take nothing by their suit and that the defendant, Texas and Pacific Railway Company, should be allowed to go hence without day and with its costs;

And it further appearing that the said cross-plaintiff, the Texas and Pacific Railway Company, should take nothing by its cross-action against the said third party defendant, W. H. Nichols and Company;

It is, therefore, Ordered, Adjudged and Decreed that the plaintiffs, Dovie Ray Baker, administratrix of the Estate of Claude Baker, deceased, Dovie Ray Baker, individually and Dovie Ray Baker as Next Friend for the minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and the said minors, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and each of them, and intervenor, Employers Mutual Liability Insurance Company of Wisconsin, take nothing by their suit and that the defendant, the Texas and Pacific Railway Company be allowed to go hence without day and with its costs;

It is further, Ordered, Adjudged and Decreed that the cross-plaintiff, Texas and Pacific Railway Company, take [fol. 66] nothing by its third party cross-action against W. H. Nichols and Company and that the said W. H. Nichols and Company be allowed to go hence without day and with its costs;

It is further Ordered, Adjudged and Decreed that the defendant, Texas and Pacific Railway Company, do have and recover of and from the plaintiffs, Dovie Ray Baker, Administratrix of the Estate of Claude Baker, deceased, Dovie Ray Baker, individually and Dovie Ray Baker as Next Friend for her minor children, Bobby Glen Baker, Claudette Baker, Oleta Fay Baker, and the said minors, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, jointly and severally, all costs of court incurred in this cause for which let execution issue.

To which action of the court in entering the foregoing judgment the plaintiffs, Dovie Ray Baker, Administratrix of the Estate of Claude Baker, deceased, Dovie Ray Baker, individually and Dovie Ray Baker as Next Friend for her minor children, Bobby Glen Baker, Claudette Baker, Oleta Fay Baker, and the said minors, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and intervenor, and each of the, (sic) then and there in open Court duly excepted

and to which action of the Court in withdrawing from the jury its third party cross-action and in rendering judgment for the third party defendant, W. H. Nichols and Company, the third party plaintiff, the Texas and Pacific Railway Company, then and there in open Court duly excepted.

Judgment Rendered, Entered and Signed this the 24th day of October, 1956.

[fol. 67]

/s/ Paul Peurifoy, Judge of the 95th Judicial District Court in and for Dallas County, Texas.

Approved as to Form:

Caldwell, Baker and Jordan, By /s/ Russell W. Baker, Attorneys for Plaintiff.

Strasburger, Price, Kelton, Miller and Martin, By /s/ Mark Martin, Attorneys for third party defendant, W. H. Nichols and Company.

Robertson, Jackson, Payne, Lancaster and Walker, By /s/ D. L. Case, Attorneys for defendant and cross-plaintiff, Texas and Pacific Railway Company.

[fol. 71]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

PLAINTIFFS' AMENDED MOTION FOR NEW TRIAL—
Filed November 22, 1956

To Said Honorable Court:

Now come the Plaintiffs in the above entitled and numbered cause with leave of court first had and obtained and within 20 days after filing their motion for new trial file this their Amended Motion for a New Trial in lieu of their original motion for a new trial filed hereon on the 2nd day of November, 1956, and move the court to set aside the verdict and judgment heretofore rendered against them and to grant Plaintiffs a new trial upon the following grounds:

—1—

The Court erred in overruling the exceptions contained in Paragraph 1 of Plaintiff's First Supplemental Petition in answer to Defendant's Third Amended Original Answer, Paragraph 9 thereof, because Defendants did not allege any facts which would constitute an estoppel or prevent Plaintiffs from asserting a claim against Defendant based upon the true facts in this case and because such allegations were highly prejudicial and inflammatory.

—2—

The Court erred in overruling the exceptions contained in Paragraph 1 of Plaintiff's First Supplemental Petition in answer to Defendant's Third Amended Original Answer, Paragraph 9 thereof, particularly that portion of said paragraph wherein Defendant alleged that Plaintiff Dovie Ray Baker and her minor children collected from Employers Mutual Liability Insurance Company the full benefits provided under the Workmen's Compensation Laws of the State of Texas for the death of Claude Baker, deceased, [fol. 72] and in permitting counsel for Defendant to read such allegations in the presence of the jury, same being highly prejudicial and inflammatory.

—3—

The Court erred in overruling the exceptions contained in Paragraph II of Plaintiff's First Supplemental Petition to Defendant's Third Amended Original Answer in Paragraph XI, Subsection (b) thereof.

—4—

The Court erred in overruling the exceptions contained in Plaintiff's First Supplemental Petition, Paragraph III to the allegations of Defefendant's (sic) Third Amended Original Answer contained in Paragraph 11 (c) thereof.

—5—

The Court erred in overruling Plaintiff's exceptions to Special Issue No. 21 of the Court's main charge because

there was no evidence to authorize to submission of said issue and insufficient competent evidence to authorize the submission of said issue.

—6—

The Court erred in overruling Plaintiff's objections to Special Issue No. 22 of the Court's main charge because there was no evidence to authorize the submission of said issue and insufficient competent evidence to authorize the submission of said issue.

—7—

The Court erred in overruling Plaintiff's exceptions to Special Issue No. 27 of the Court's main charge reading [fol. 73] as follows:

"Plaintiff excepts and objects to the submission of Special Issue No. 27, because there is no evidence authorizing the submission of said issue and insufficient evidence to authorize the submission of said issue; because the same is a comment upon the weight of the evidence in that it assumes that Claude Baker was in a place of safety and stepped from a place of safety into the path of the Eastbound train,

And for the further reason that the same is duplicitous in that respect and that it inquires, first, if he was in a place of safety and, secondly, if he stepped from a place of safety into the path of the train.

In this connection, Plaintiff points out to the Court that the testimony in this respect is highly controverted, there being no testimony that the deceased, Claude Baker, was in a place of safety.

Plaintiff further excepts and objects to said issue because the Court had nowhere inquired or submitted to the jury a question of whether or not the deceased, Claude Baker, was in a place of safety, which issue should be submitted, and a finding to special issue No. 27 conditioned, upon an affirmative answer to the issue inquiring whether he was in a place of safety."

—8—

The Court erred in overruling Plaintiff's exceptions and objections to Special Issues No. 27, 28 and 29 of the Court's main charge reading as follows:

[fol. 74] "Plaintiff objects to the submission of Special Issues Nox. (sic) 27, 28 and 29 because the issues as framed do not permit the jury to take into consideration the fact that at the time the east bound train approached, the deceased Claude Baker was standing in a place of safety, the evidence in this case raising such question as a fact issue."

—9—

The Court erred in overruling Plaintiff's exceptions and objections to Special Issue No. 28 of the Court's main charge reading as follows:

"Plaintiff excepts and objects to the submission of Special Issue No. 28 because there is no evidence authorizing the submission of said issue and insufficient evidence to authorize the submission of said issue; because the same is a comment upon the weight of the evidence in that it assumes that Claude Baker was in a place of safety and stepped from a place of safety into the path of the east bound train and for the further reason that the same is duplicitous in that respect and that it inquires first if he was in a place of safety and secondly, if he stepped from a place of safety into the path of the train.

In this connection Plaintiff points out to the court that the testimony in this respect is highly controverted there being no testimony that the deceased Claude Baker was in a place of safety.

Plaintiff further excepts and objects to said issue because the court has no where inquired or submitted to the jury a question or (sic) whether or not the deceased Claude Baker [fol. 75] was in a place of safety, which issue should be submitted, and a finding to Special Issue No. 28 conditioned upon an affirmative answer to the issue inquiring whether he was in a place of safety.

Plaintiff excepts and objects to the submission of Special Issue No 28 because the same is based upon an affirmative

answer to Special Issue No. 27 and 27-A, and because the court assumes in Special Issue No. 27 and Special Issue No 28 that the deceased Claude Baker was in a place of safety and stepped into the path of the east bound train.

Plaintiff further objects to the submission of Special Issue No. 28 because the same is not an ultimate issue and an affirmative finding thereon would not authorize a judgment for the Defendant."

—10—

The Court erred in overruling Plaintiff's exceptions and objections to Special Issue No. 29 of the Court's main charge reading as follows:

"Plaintiff excepts and objects to the submission of Special Issue No. 29 because there is no evidence authorizing the submission of said issue and insufficient evidence to authorize the submission of said issue because the same is a comment upon the weight of the evidence in that it assumes that Claude Baker was in a place of safety and stepped from a place of safety into the path of the east bound train and for the further reason that the same is duplicitous in that respect and that it inquires, first if he was in a place of safety and secondly, if he stepped from a place of safety into the path of the train.

In this connection, Plaintiff points out to the court that [fol. 76] the testimony in this respect is highly controverted, there being no testimony that the deceased Claude Baker was in a place of safety.

Plaintiff further excepts and objects to said issue because the Court has nowhere inquired or submitted to the jury a question of whether or not the deceased Claude Baker, was in a place of safety, which issue should be submitted, and a finding to Special Issue No. 29 conditioned upon an affirmative answer to the issue inquiring whether he was in a place of safety.

Plaintiff excepts and objects to the submission of Special Issue No. 29 because the same is based upon an affirmative answer to Special Issue No. 27 and because the court assumes in Special Issue No. 27 and Special Issue No. 28 that the deceased Claude Baker was in a place of safety and stepped into the path of the east bound train.

Plaintiff further objects to the submission of Special Issue No. 29 because the same is not an ultimate issue and an affirmative finding thereon would not authorize a judgment for Defendant.

—11—

The Court erred in failing to submit Plaintiff's Special Requested Issue No. 1 reading as follows:

"Do you find a preponderance of the evidence that with reference to the work W. H. Nichols & Company, Inc., was performing at the time Claude Baker, deceased, was killed, W. H. Nichols & Company, Inc., was not an independent contractor?

Answer "It was not an independent contractor" or, "It was an independent contractor."

Answer: .....

[fol. 77] "An independent contractor" as used in the above Special Issue, is meant any person, who, in the pursuit of a business or occasion undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done, as to the result of his work, and not as to the means or method by which it is accomplished."

—12—

The Court erred in failing to submit Plaintiff's Special Requested Issue No. 11 reading as follows:

"Do you find from a preponderance of the evidence that Defendant on the occasion in question failed to furnish the deceased, Claude Baker, a reasonably safe place to work?

Answer "Yes" or "No".

Answer: .....

—13—

The Court erred in failing to submit Plaintiff's Special Requested Issue No. 11A reading as follows:

"If you have answered the preceding Special Issue "Yes" then answer the following Special Issue, but if you have answered the preceding Special Issue "No", then you need not answer the following Special Issue.

Special Issue No. 11A:

Do you find from a preponderance of the evidence that such failure, if any you have found, in answer to the preceding Special Issue, was negligence?

[fol. 78] Answer "Yes" or "No".

Answer: ....."

—14—

The Court erred in failing to submit Plaintiff's Special Requested Issue No. 11-B reading as follows:

"If you have answered the preceding Special Issue "Yes", then answer the following Special Issue, but if you have answered said Issue, "No", then do not answer the following Special Issue:

Special Issue No. 11-B:

Do you find from a preponderance of the evidence that such negligence, if any you have found, in answer to the preceding Special Issue, was the proximate cause of the injuries sustained by Claude Baker, deceased?

Answer "Yes" or "No".

Answer: ....."

—15—

The Court erred in failing to submit the Plaintiff's Special Requested Issue No. 12 reading as follows:

"What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude Baker, deceased, and that attributable to Defendant, Texas & Pacific Railway Company?

Answer: Attributable to Claude Baker, deceased, ... per cent.

Answer: Attributable to The Texas & Pacific Railway Company, ... per cent."

—16—

The Court erred in failing to submit Plaintiff's Special Requested Issue No. 13 reading as follows:

[fol. 79] "Do you find from a preponderance of the evidence that at the time Claude Baker, deceased, sustained his fatal injuries, W. H. Nichols & Company, Inc., did not bear the relationship to Texas & Pacific Railway Company of an independent contractor, as that term has been defined herein for you.

Answer "It was not an independent contractor" or, "It was an independent contractor".

Answer: ..... .

"An independent contractor as used herein is any person, who, in the pursuit of a business or occupation, undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done only as to the result of his work and not as to the means or method by which it is accomplished."

—17—

The Court erred in overruling Plaintiff's motion to instruct counsel for Defendant to eliminate and not read in the presence of the jury all of Paragraph 9 of Defendant's Third Amended Original Answer, with the exception of the first sentence thereof, particularly that portion wherein Defendant alleged that Plaintiff Dovie Ray Baker made claim to the Industrial Accident Board of the State of Texas because of the fatal injuries sustained by Claude [fol. 80] Baker, such allegations having no place before the jury and involving matters of law and not matters of fact and because the reading of said allegations to the jury would be highly prejudicial and inflammatory and would cause the jury to believe that the Plaintiff Dovie Ray Baker and her children had been fully compensated for the death of Claude Baker, deceased, such motion by Plaintiffs having been presented to the court prior to the time counsel for Defendant Texas & Pacific Railway Company had read its Third Amended Original Answer to the jury.

—18—

The Court erred in overruling Plaintiffs objection to the statement made by counsel for Defendant Texas & Pacific Railway while interrogating the jury panel as a whole, that Plaintiff Dovie Ray Baker and her minor children had filed claim for compensation under the Workmen's Compensation Law alleging that her husband was an employee of W. H. Nichols & Company, Inc., and had processed that claim to final disposition before the Industrial Accident Board, and in refusing to instruct counsel for Defendant not to refer to such matter because such statement was highly prejudicial and inflammatory to the rights of plaintiffs.

—19—

The Court erred in overruling the motion made by counsel for Plaintiffs to instruct the jury to disregard the statement made by counsel for Defendant Texas & Pacific Railway Company while interrogating the jury panel as a whole, that Plaintiff Dovie Ray Baker and her minor children had [fol. 81] filed claim for compensation under the Workmen's Compensation Law alleging that her husband was an employee of W. H. Nichols & Company, Inc., and had processed that claim to final disposition before the Industrial Accident Board, because such statement was highly prejudicial and inflammatory and was calculated to cause the jury to believe that Plaintiff Dovie Ray Baker and her minor children had been fully compensated for the damages they suffered because of the death of Claude Baker, deceased.

—20—

The Court erred in failing to grant Plaintiff's motion to withdraw Defendant's Exhibits 1 and 2 from the consideration of the jury and not permit the same to be taken into the jury room during the jurors' deliberations for the reason that said Exhibits at that stage of the trial were highly prejudicial and inflammatory and had no bearing on any issue in the case, the Court having failed to submit Plaintiff's theory that the deceased Claude Baker came under the terms and provisions of the Federal Employers

Liability Act and such claims being admissible, if at all, only on the question of showing that the Plaintiffs had taken an inconsistent position before the Industrial Accident Board with the position that they were then taking in this case and that to permit the jury to consider said exhibits and to take them in to the jury was calculated to cause them to discuss and consider the question of whether or not Plaintiff and her children had been fully compensated for their damages by having made and processed to final [fol. 82] disposition a claim before the Industrial Accident Board of the State of Texas based upon the death of Claude Baker, as an employee of W. H. Nichols & Company, Inc.

—21—

The Court erred in overruling the motion of counsel for Plaintiffs prior to the Plaintiff Dovie Ray Baker took the witness stand to instruct counsel for Defendant not to interrogate the said Dovie Ray Baker with respect to the fact that the claim for compensation which she filed with the Industrial Accident Board because of the death of her husband Claude Baker based upon the assertion that he was an employee of W. H. Nichols & Company, Inc., was processed to a final conclustion (sic) and in refusing to instruct counsel for the Defendant not to interrogate said witness with respect to the amount of such award for the reason that the introduction of such testimony before the jury would be highly prejudicial to the rights of Plaintiffs and to permit counsel for Defendant to develop that Plaintiff Dovie Ray Baker filed a claim for compensation and that the claim proceeded to a final determination without informing the jury as to what the final determination was, would cause the jury to speculate and surmise, first, as to whether or not she recovered any thing at all and, second, if she did recover as to the amount thereof, and was calculated to cause the jury to surmise and conclude that Dovie Ray Baker and her children had been fully compensated for the death of the said Claude Baker and such conclusion or inference thereby left with the jury, by permitting the jury [fol. 83] to know that the claim was processed to a final determination, was calculated to cause the jury to feel that

Plaintiffs were not entitled to recover any damages and further, because such testimony was in violation of the rule announced by the Supreme Court in Meyers vs. Thomas.

—22—

The Court erred in admitting in evidence before th (sic) jury Defendant's Exhibits Nos. 1 and 2 being notice and injury for claim for compensation filed by Dovie Ray Baker with the Industrial Accident Board of the State of Texas alleging that Claude Baker, deceased, was an employee of W. H. Nichols & Company, Inc., and in failing to limit such evidence as requested by Plaintiffs to impeachment purposes and for the purpose of showing that Plaintiff Dovie Ray Baker had made a prior inconsistent statement.

—23—

The Court erred in admitting in evidence testimony from the Plaintiff Dovie Ray Baker elicited upon cross-examination by counsel for Defendant that she had filed a claim for compensation on behalf of herself and her minor children with the Industrial Accident Board of the State of Texas based upon the fact that Claude Baker, deceased, was an employee of W. H. Nichols & Company, Inc., and in failing to limit such testimony by instructing the jury that it was admitted for impeachment purposes only and for the purpose of showing that Plaintiff had made a prior inconsistent statement, counsel for Plaintiff having requested the court [fol. 84] to so limit such testimony prior to the time the same was admitted.

—24—

The Court erred in admitting in evidence testimony of the witness I. N. Malone offered by counsel by Defendant Texas & Pacific Railway Company over the objection of Plaintiffs that such statement was self serving and hearsay and an attempt to bolster the testimony of the Defendant's own witness, Williams, the engineer of the train, said question and answer reading as follows:

"Q (By Mr. Case) What I meant is; state whether or not at the time, at or about the time that he stopped, or was stopping the train, Mr. Williams said anything about what this man had done, just before he was struck?

A. Oh, yes. He just told me that he backed into the corner of the engine. That he had backed right back into the corner of the engine."

Wherefore, Plaintiffs pray that the Court set aside the verdict of the jury herein and the judgment rendered thereon in favor of Defendant Texas & Pacific Railway Company and against Plaintiffs and grant a new trial herein.

/s/ Russell W. Baker, Of: Caldwell, Baker and Jordan, 305 Medical Arts Building, Dallas, Texas, Attorneys for Plaintiffs.

Duly sworn to by Russell W. Baker, jurat omitted in printing.

[fol. 85]

[File endorsement omitted]

[fol. 90]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S REQUESTED SPECIAL ISSUE NO. 1—
Filed October 5, 1956

Comes now the Plaintiff in the above entitled and numbered cause before the Court's charge has been read to the jury and requests the Court to submit to the jury the following special issue:

Gentlemen of the Jury:

Do you find from a preponderance of the evidence that with reference to the work W. H. Nichols & Company, Inc., was performing at the time Claude Baker, deceased was killed, W. H. Nichols & Company, Inc., was not an independent contractor?

Answer "It was not an independent contractor" or, "It was an independent contractor."

Answer: .....

"An independent contractor" as used in the above Special Issue, is meant any person, who, in the pursuit of a business or occasion undertakes to do a particular work for other [fol. 91] persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done, only as to the result of his work, and not as to the means or method by which it is accomplished.

/s/ Caldwell, Baker & Jordan, Attorneys for the Plaintiff.

The foregoing Special Requested Issue of the Plaintiff was presented to the court and counsel for the defendant before the Court's charge had been read to the jury, and the same was by the Court refused, to which action of the Court the plaintiff excepted.

/s/ Paul Peurifoy, Judge.

[File endorsement omitted]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFFS' REQUESTED SPECIAL ISSUE NO. 11—
Filed October 5, 1956

Comes now the Plaintiff in the above entitled and numbered cause before the Court's charge has been read to the jury and requests the Court to submit to the jury the following special issue:

Gentlemen of the Jury:

Do you find from a preponderance of the evidence that Defendant on the occasion in question failed to furnish the deceased, Claude Baker, a reasonably safe place to work?

[fol. 92] Answer "Yes" or "No"

Answer: .....

If you have answered the preceding Special Issue "Yes" then answer the following Special Issue, but if you have answered the preceding Special Issue "No", then you did not answer the following Special Issue.

Special Issue No. 11A

Do you find from a preponderance of the evidence that such failure, if any, you have found in answer to the preceding Special Issue, was negligence?

Answer "Yes or "No".

Answer: .....

/s/ Caldwell, Baker & Jordan, Attorneys for the Plaintiff.

The foregoing Special Requested Issue of the Plaintiff was presented to the court and counsel for the defendant before the Court's charge had been read to the jury, and the same was by the Court refused, to which action of the Court the plaintiff excepted.

/s/ Paul Peurifoy, Judge.

If you have answered the preceding Special Issue "Yes", then answer the following Special Issue, but if you have answered said Issue, "No", then do not answer the following Special Issue:

Special Issue No. 11B

Do you find from a preponderance of the evidence that such negligence, if any you have found, in answer to the preceding Special Issue, was the proximate cause of the injuries sustained by Claude Baker, deceased?

Answer "Yes" or "No"

Answer: .....

[fol. 93]

[File endorsement omitted]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFFS' REQUESTED SPECIAL ISSUE No. 12—
Filed October 5, 1956

Comes now the Plaintiff in the above entitled and numbered cause before the Court's charge has been read to the jury and requests the Court to submit to the jury the following special issue:

Gentlemen of the Jury:

What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude Baker, deceased, and that attributable to Defendant, Texas & Pacific Railway Company?

Answer: Attributable to Claude Baker, deceased, ... per cent.

Answer: Attributable to The Texas & Pacific Railway Company, ... per cent.

/s/ Caldwell, Baker & Jordan, Attorneys for the Plaintiff.

The foregoing Special Requested Issue of the Plaintiff was presented to the court and counsel for the defendant before the Court's charge had been read to the jury and the same was by the Court refused, to which action of the Court the plaintiff excepted.

/s/ Paul Peurifoy, Judge.

[File endorsement omitted]

[fol. 94]

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFFS' REQUESTED SPECIAL ISSUE NO. 13—
Filed October 5, 1956

Comes now the Plaintiff in the above entitled and numbered cause before the Court's charge has been read to the jury and requests the Court to submit to the jury the following special issue:

Gentlemen of the Jury:

Do you find from a preponderance of the evidence that at the time Claude Baker, deceased, sustained his fatal injuries, W. H. Nichols & Company, Inc., did not bear the relationship to Texas & Pacific Railway Company of an independent contractor, as that term has been defined herein for you.

Answer "It was not an independent contractor" or, "it was an independent contractor".

Answer: .....

"An independent contractor as used herein is any person, who, in the pursuit of a business or occupation, undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done only as to the result of his work and not as to the means or method by which it is accomplished."

/s/ Caldwell, Baker & Jordan, Attorneys for the Plaintiff.

The foregoing Special Requested Issue of the Plaintiff was presented to the court and counsel for the defendant before [fol. 95] the Court's charge had been read to the jury, and

the same was by the Court refused, to which action of the Court the plaintiff excepted.

/s/ Paul Peurifoy, Judge.

[File endorsement omitted]

[fol. 124] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 3]

IN THE DISTRICT COURT, DALLAS COUNTY, TEXAS,
95TH JUDICIAL DISTRICT

No. 73,418-E/D

DOVIE RAY BAKER, et al.

vs.

TEXAS & PACIFIC RAILWAY CO.

Statement of Facts—October 1st, 1956

APPEARANCES:

Messrs. Caldwell, Baker & Jordan, of Dallas, Texas, By Hon. Russell M. Baker and Hon. Robert M. Hill, For the Plaintiffs.

Messrs. Robertson, Jackson, Payne, Lancaster & Walker, of Dallas, Texas, By Hon. Donald L. Case, For the Defendant.

[fol. 4] Mr. Case: This will be entitled:

STIPULATION OF FACT IN CONNECTION WITH
DEFENDANT'S PLEA IN ABATEMENT

Now come the parties, Plaintiff and Defendant, and in connection with the Plea in Abatement filed by Defendant in this cause, and stipulates the following facts to be true

and correct, and stipulate that the Court may consider such facts true and correct the same as though evidence were introduced before the Court to establish them;

It is stipulated that Claude Baker, the deceased husband of the Plaintiff, Dovie Ray Baker, received his fatal injuries on or about August 20th, 1952. Thereafter on or about January 2nd, 1953, suit was filed in behalf of Dovie Ray Baker individually and as next friend for the three minor children of hers and her deceased husband. In the Petition then filed no effort was made to allege a cause of action under the Federal Employers Liability Act, but such suit was a straight suit for wrongful death and for [fol. 5] conscious pain and suffering. Thereafter on or about August 29th, 1953, the Plaintiff filed her First Amended Original Petition in which she set up as an alternative cause of action an alleged cause of action under the Federal Employers Liability Act; such suit was continued in the name of Dovie Ray Baker individually and as next friend for her minor children.

Thereafter, Plaintiff amended her First Amended Original Petition still alleging two alternative causes of action and still suing individually and as next friend for her minor children. The cause proceeded to trial on or about May 31st, 1955, and continued to a verdict for the Defendant on or about June 3rd, 1955. During the course of such trial evidence was offered by the Plaintiff tending to establish that the deceased was an employee of the Defendant.

During the preparation of the Court's charge, Defendant specifically called to the Court's attention and to the attention of Counsel for Plaintiff that Plaintiff Dovie Ray Baker in her individual capacity and in her capacity as next friend could not maintain a suit for death under the Federal Employers Liability Act; that the only proper person to maintain such action was the personal representative of the deceased.

Thereafter, on or about August 25th, 1955, on the amended Motion of Plaintiff for New Trial, the Court granted a new trial and set aside the judgement and [fol. 6] verdict. Thereafter, on the 11th day of October, 1955, Dovie Ray Baker was duly qualified as permanent

administratrix of the estate of Claude Baker, deceased. No additional or amended pleadings were filed in this cause by Plaintiff until Plaintiff filed her Third Amended Original Petition on September 14th, 1956, when, for the first time, Plaintiff in her capacity as Administratrix of the estate of Claude Baker, deceased, filed suit under the Federal Employers Liability Act.

Mr. Case: Is that substantially correct?
Mr. Baker: I think that's right.
Mr. Case: (Continuing stipulation:)

Thereafter, on the 1st day of October, 1956, and before this cause proceeded to trial, the defendant filed and urged its plea in abatement to that portion of Plaintiff's Third Amended Original Petition wherein she undertakes to recover under the terms of the Federal Employers Liability Act, urging in such plea in abatement that any cause of action under the Federal Employers Act is barred by limitations.

Mr. Baker: I would like later to verify by pleadings the file marks we have on those dates. I assume they are the same as they were set out on the docket sheet.
Mr. Case: All right.

[fol. 7] Tom Baker, the first witness called by the Plaintiffs, having first been duly sworn, testified as follows, to-wit:

Direct Examination.

[fol. 8] By Mr. Russell M. Baker:

Q. Would you give your name, please?
A. Tom Baker.
Q. How old a man are you?
A. Forty-four.
Q. Are you married?
A. Yes.
Q. Where do you live at the present time?
A. Terrell.
Q. Who are you employed by?

A. Crown Buick Company.

Q. About how long have you been working for the Crown Buick Company?

A. Two years.

Q. Before you went to work for them who did you work for, Mr. Baker?

A. I worked for different ones. W. H. Nichols Company, gin company.

Q. All right. About when was your first—when you first went to work for the W. H. Nichols Company?

A. 1950.

Q. You worked for the W. H. Nichols Company off and on up until what time?

A. Fall of 1952; 1953, rather.

Q. Mr. Baker, were you related to Claude Baker, now [fol. 9] deceased?

A. Yes.

Q. What was your relationship?

A. First cousin.

Q. Were you and Claude brought up together, so to speak?

A. Yes, sir.

Q. Reared on the farm?

A. Yes, sir.

Q. And then after he—after you went to work for W. H. Nichols & Company, did he work there on the right of way with you, Mr. Baker?

A. Yes.

Q. For the T & P?

A. Yes, sir.

Q. I will ask you to tell the jury what kind of health Claude Baker was in at the time of his death?

A. In good health.

Q. Had you ever heard him complain of having anything wrong?

A. No, sir.

Q. What kind of a worker was he?

A. He was a good worker.

Q. Did you ever do any farm work with him?

A. Yes, sir.

Q. What types of farm work did you do?

[fol. 10] A. Just general farm work, raising cotton, corn, cattle.

Q. At the time of his death where were you living?

A. Crandall.

Q. And where Claude and his family living?

A. They were about three miles of me on a farm.

Q. Crandall is just South of here?

A. Yes, sir.

Q. And in Kaufman County, isn't it?

A. Yes, sir.

Q. During the time Claude was not working in the gin or on other public work, was he farming?

A. Yes, sir.

Q. What kind of a—you had occasion to observe his ability as a farmer?

A. Yes, sir.

Q. Throughout the years?

A. Yes, sir.

Q. What kind of a farmer was he, a good one or a bad one?

A. He was a good farmer.

Q. Well, while he was working for W. H. Nichols out here on this right of way of the T & P, I will ask you to tell the jury whether or not in addition to working there he also raised a crop out there?

A. Yes, sir.

Q. How many acres did he have?

[fol. 11] A. Thirty-five or forty acres; he raised cotton.

Q. And had he done that same thing, planting a crop in the fall for a number of years, in addition to doing other work?

A. Yes, sir.

Q. Did you and Claude and your respective families help each other?

A. Yes.

Q. And when did—did you have a crop also?

A. Yes.

Q. Did you have a crop the year he got killed?

A. Yes.

Q. When did you do the farm work, or when did you plant your cotton and grain and ail?

A. After we got home in the evenings and at night.
Q. Claude ride a tractor at night?
A. Yes, sir.
Q. Did you ride a tractor at night?
A. Yes, sir.
Q. Other than having cotton and grain the year that he got killed, did he have anything else there on his place?
A. Calves and hogs.
Q. Did he have a garden?
A. Yes, sir.
Q. Was he a man of good habits or not?
A. I never knew of any bad ones he had.
[fol. 12] Q. Do you recall when it was that he went to work out there on the right of way with you the last time?
A. April, I believe it was.
Q. Of what year?
A. 1952.
Q. And he worked then how long up until his death, and what day did his death take place?
A. August 20th.
Q. What was his job out there?
A. Cement man.
Q. So that we will have some understanding of it, Mr. Baker, what was a cement man; just what were his duties?
A. Well, he handled cement. We mixed it and I got the sand and that was his job, to handle it.
Q. I believe I might get it a little better if I get in evidence some pictures.

(Conference at Bench)

Q. I hand you three large photographs which have been marked Plaintiff's Exhibits 1, 2, 3 and 4, and ask you if you can identify those photographs (hands to witness)?
A. (Witness looks) Yes, sir.
Q. Were you there when they were made?
A. Yes, sir.
Q. Do they correctly represent the scene of the accident when Mr. Baker met his death?
[fol. 13] A. Yes, sir.
Q. And does it, do they show the machine on which you were working?

A. Yes, sir.
Q. And was it in that same location?
A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Baker: All right. Well, we offer each of these in evidence; they have been marked.

(Discussion at Bench)

(Reporter's Note: At this point, photographs referred to above were re-marked for the purposes of this trial for Identification as:

Plaintiff's Exhibits 1, 2, 3 & 4, and same will accompany this Transcript.)

Q. Just let me ask you this. What was the nature of the work that was being performed out there?
A. We called it grouting.
Q. Grouting?
A. Yes, and it was for the purpose of sustaining the roadbed.
Q. Doing what, now?
A. It was to straighten the roadbed.
Q. Straighten or strengthen the roadbed?
[fol. 14] A. Strengthen the roadbed; fill up all the cracks.
Q. Strengthen the roadbed?
A. Yes, sir.
Q. I didn't understand you. Strengthen the roadbed?
A. Yes, sir.
Q. If cracks and crevices would occur in the roadbed, you would fill it with this cement mixture?
A. Yes, sir.
Q. And how did you inject this cement mixture into the roadbed?
A. Through iron points.
Q. Through iron points?
A. Yes, sir.
Q. And were those iron points driven into the ground?
A. Yes, sir.

Q. And were the iron points that were driven into the ground, did they have hoses attached to it?

A. Yes, sir.

Q. And the hose, then, in turn, the other end was attached to what?

A. To the machine.

Q. All right. How many hoses did you have?

A. Two.

Q. Two hoses. And did you pump the cement through both of those hoses into the ground?

[fol. 15] A. Yes, sir.

Q. And did both of them have that steel pipe that you called a point?

A. Yes, sir.

Q. How did the cement get out of that pipe then into the ground?

A. Through the two holes in the bottom of the points.

Q. In the bottom of them?

A. Yes, sir.

Q. And would you drive those points into the ground?

A. Yes, sir.

Q. Wherever there were any crevice or crack, or wherever you wanted to inject the cement?

A. Yes, sir.

Q. Would that be correct?

A. Yes, sir.

Q. And is that the nature of the work that you did all of the time out there?

A. Yes, sir.

Q. I hand you now Plaintiff's Exhibit No. 1, and ask you if that is the machine (hands to witness); can you see it right there?

A. Yes, sir.

Q. Let's hold it around. Is this the machine?

A. Yes, sir.

[fol. 16] Q. And that you were working on?

A. Yes. sir.

Q. Now, were there two sets of tracks out there at the point where you were working?

A. Yes, sir.

Q. I don't believe we have identified where this machine was located and where you were working at the time Claude met his death; where was it?

A. It was on the South side of the tracks.

Q. And where with reference to Dallas?

A. In between Dallas and Grand Prairie.

Q. Do you know where Highway 80 is, the Fort Worth Highway is, out there?

A. Yes, sir.

Q. And do you know where Ledbetter Drive is?

A. Yes, sir.

Q. Was it in that general area or vicinity?

A. Yes; in Mountain Creek bottom.

Q. Mountain Creek bottom?

A. Yes.

Q. All right. Now, the machines are sitting on which side of the tracks?

A. South side.

Q. And the track nearest the machine is the track—which track, the Eastbound track?

[fol. 17] A. Yes, sir.

Q. All right.

A. The one the train was on that killed him.

Q. And the other track, then, is the Westbound track—is that correct?

A. Yes, sir.

Q. All right. Now, I see here two what appear to be hose that come off of the machine. Is that the hose that you mentioned a minute ago?

A. Yes, sir.

Q. And I see here hose running down beside this track and hose over here (indicating)?

A. That's right.

Q. So, were those the hoses that were in use out there at the time?

A. Yes, sir.

Q. Looking now at Plaintiff's Exhibit No. 2, is that a photograph that shows the same where you were working?

A. Yes, sir.

Q. Now, I might interrupt you here and inquire if there

was another machine also there in operation or use there in that area?

A. Yes, sir.

Q. And where was that machine with reference to the one that was being—to the one seen here in the photograph?

[fol. 18] A. West of it.

Q. We are looking in which direction in this picture—can all of you see it?

A. Looking East.

Q. You are looking East?

A. Yes, sir.

Q. The other machine, then, was West of the one we see here?

A. Yes, sir.

Q. All right. Looking now at Plaintiff's Exhibit No. 3, which direction are we looking in that photograph?

A. West.

Q. Looking West?

A. Yes, sir.

Q. And would you step down here, please?

A. (Witness leaves stand)

Q. Stand back there.

Mr. Baker: Can all of you see now?

By Mr. Baker:

Q. Mr. Baker, in this photograph we are looking West, did you say?

A. Yes, sir.

Q. And is this also the machine?

A. Yes, sir.

Q. And where did Mr. Claude Baker work?

A. Right here by the side of it.

Q. By the side of the machine?

[fol. 19] A. Yes, sir.

Q. Now, you are pointing up toward the East end. Point out specifically, if you can on that photograph, exactly where his work required him to be?

A. Right here by this cement right here (indicating).

Q. Is this cement sacks we have here?

A. Yes, sir.

Q. Where my finger is?

A. Yes, sir.

Q. All right. And where did he work with reference to the cement sacks; did he work West of the sacks or East of the sacks?

A. West of them.

Q. All right, now, let me get another photograph here. Looking at Plaintiff's Exhibit No. 4, this simply is a duplicate of the Plaintiff's Exhibit No. 3, is it not?

A. Yes, sir.

Q. All right.

Mr. Baker: You want to see them? (Hands to opposing counsel)

Mr. Case: No; I just wanted to stand over here.

Mr. Baker: If the Court please, I would like to take just five minutes and pass these photographs to the Jury.

The Court: All right. All right.

Mr. Baker: (Hands to jury) Mr. Easter, I will hand [fol. 20] them to you and you can pass them down.

The Court: We will recess as soon as they get through.

(Conference at Bench)

Mr. Baker: Let the record show we offer each of these photographs in evidence.

The Court: All right. Ladies and Gentlemen, at this time I am going to recess until 9:30 in the morning, and I will give the Jury this Instruction. I don't know whether any of you live in an area and whether you go about this place; I am giving you this instruction now; that if any of you do or have a temptation to go out there and look at it, do not do it. I am giving you that instruction at this time; do not go near the scene of this place. Please bear those instructions in mind throughout the trial; be back in the morning at 9:30.

(The Jury Out)

(Conference at Bench)

Mr. Baker: Be it remembered, that upon the trial of this case and during the interrogation of the jury panel while Mr. Donald Case, the attorney for the Texas & Pacific

Railroad Company, was interrogating the panel as a whole, he made the statement that the Plaintiff, Dovie Ray Baker, and her minor children had filed a claim for Compensation under the Workmens Compensation Law alleging that her husband was an employee of W. H. Nichols Company and processed that claim to final disposition before the Indus- [fol. 21] trial Accident Board, at which time Counsel for the Plaintiff objected to the reference that such claim was processed to final disposition before the Industrial Accident Board, for the reason that the same was highly prejudicial and inflammatory to the rights of this Plaintiff in this case and requested the Court to instruct counsel for the Defendant to make no reference to such matter; that the Court overruled Plaintiff's objection to such statement by counsel.

Mr. Case: Is this a Motion for mistrial?

Mr. Baker: No.

The Court: He just wanted to preserve his exception to that.

PLAINTIFF'S MOTION TO INSTRUCT COUNSEL FOR DEFENDANT TO ELIMINATE ETC., AND RULING THEREON

Mr. Baker: That's right, and then this is the Motion.

Now comes the counsel for the Plaintiff, prior to the time Plaintiff—prior to the time counsel for Defendant Texas & Pacific Railway Company had presented its Third Amended Original Answer to the jury, and moves the Court to instruct counsel for the defendant to eliminate and not read in the presence of the jury all of paragraph 9, with the exception of the first sentence thereof, particularly that portion wherein it is alleged that Plaintiff, Dovie Ray Baker, made claims to the Industrial Accident Board of the State of Texas because of the fatal injuries sustained by Claude Baker, for the reason that the allegations of such paragraph have no place before the jury; the same [fol. 22] involves purely matters of law and not matters of fact; that the reading of said allegations to the jury is highly prejudicial and inflammatory and if proper at all should be addressed to the consideration of the Court alone. Plaintiff would show unto the Court that the reading of said portion of said pleading to the jury is calculated

to cause the jury to believe that the Plaintiff and her children have been fully compensated for the death of Claude Baker, deceased; that the reading of said pleadings in the presence of the jury could serve no useful purpose because all of the matters involved therein, with the exception of the first sentence, deals purely with a question of law which are of no concern to this jury. And let the record show that the Court overruled the Motion and permitted counsel to read all of the Paragraph 9, which—with the exception of the following quote, "Defendant would further show that on the basis of such allegations, and on the basis of fact, that the said Plaintiff, Dovie Ray Baker and her minor children from whom she now brings this suit, have collected from Employers Mutual Liability Insurance Company of Wisconsin, the compensation insurance for W. H. Nichols Insurance Company, Inc., the full benefits provided under the Workmens Compensation Laws of the State of Texas for the death of Claude Baker, deceased", unquote, and, quote, "And that having once collected the full benefits for the death of her husband", unquote, and, quote, "Purpose of collecting other money", unquote. Let the record show that the Court overruled the Motion. Okay.

[fol. 23] Mr. Case: With the exception that the defendant's counsel was instructed not to read the portions of that paragraph which Mr. Baker has just quoted.

Mr. Baker: Yes; I think that is in there; if it is not, those portions in quotes were not read to the jury.

Recess

9:30 A. M., October 2nd, 1956

The Jury in

Mr. Russell M. Baker: Mr. Baker, would you take the stand again, please?

(Witness, Tom Baker, cont'd)

The Court: Good morning, ladies and gentlemen. All right. Let's proceed.

Direct examination.

By Mr. Russell M. Baker (Continued):

Q. I believe when we quit yesterday we had just finished looking at some pictures, Mr. Baker. Now, I want to ask you some questions with reference to whether or not there were any flags out there at the scene of the work?

[fol. 24] A. Yes, sir.

Q. Were there green flags and yellow flags?

A. Yes.

Q. And which of the flags were nearest to the machines?

A. Green ones.

Q. Did you have a green flag on each end of either machine?

A. Yes, sir; both of them.

Q. Now, you were working on which machine?

A. On the East one.

Q. All right, and then was there a green flag on the—East of the East machine, the one you were working on?

A. Supposed to have been.

Q. Well, was there one there?

A. I don't know for sure. It was supposed to have been there.

Q. Generally did they have one there?

A. Yes, sir.

Q. All right. Then the other machine was located West of your machine?

A. Yes, sir.

Q. About how far West of your machine was it located?

A. Six hundred feet.

Q. And was there a green flag West of that West machine?

A. Supposed to have been there.

Q. All right. Now, in addition to the green flags, did they [fol. 25] have yellow flags out there?

A. Yes, sir.

Q. And was there a yellow flag on either end of each machine?

A. Yes, sir.

Q. That is, I mean there was a yellow flag West of the West machine?

A. Yes, sir.

Mr. Case: Now, if the Court please, I understand it would be quicker, but I object to Mr. Baker leading his witness.

The Court: Yes; let's don't lead.

Mr. Baker: All right. I didn't think there was any controversy about it.

Q. Where was the yellow flag, then, on the East—East of the East machine?

A. Supposed to have been about a mile.

Q. And how far was the flag on the—

Mr. Case: Now, if the Court please, I object to what was supposed to have been; that is a conclusion.

The Court: Yes; let's state facts and not suppositions.

Q. What is your best judgment about how far it was?

A. About a mile.

Q. And about how far was the yellow flag on the West end?

[fol. 26] A. Same distance.

Q. Within what area did the men out there on the machines work?

A. Between the green flags.

Q. And during the time that you worked out there—strike that question. What were your duties out there?

A. Operating the grout machine.

Q. And where did you work?

A. Up on the seat; you can see that in the picture there.

Q. Would you step down here and point out on this photograph here, please?

A. (Witness leaves stand)

Q. Looking now at Plaintiff's Exhibit No. 3. I believe we will go down here.

A. I worked here on this seat.

Q. On this seat right here?

A. Yes.

Q. Is that it?

A. Yes.

Q. And as you worked there which direction did you face?

A. Southeast.

Q. And, Mr. Baker, then, as you faced South or Southeast there, on which side of you did Mr. Claude Baker work on?

A. He worked back of me kind of West.

Q. Kind of West?

[fol. 27] A. Yes, sir.

Q. As you faced South or Southeast?

A. That's right.

Q. All right, now were there any other men that worked right there on the machine with you?

A. Yes, sir. There was some fellows across the machine from me. One fellow stood over on the opposite side.

Q. All right. Were there any other men that worked there around the machine itself?

A. Nothing only scooping sand, behind there.

Q. And where would they put the sand?

A. In this bucket, the machine bucket.

Q. Would you just briefly point out on this picture here and tell us how you went about doing that work there? Can you see there where you can point it out there?

A. Well, they just filled up this bucket here and filled the hopper there and dumped it in the machine.

Q. What was Mr. Claude Baker doing?

A. He was putting cement in this hopper back here.

Q. Is that the same hopper there which you were putting sand in?

A. Yes, sir.

Q. And did they put water in that hopper also?

A. Water went in this hopper up here, the rear one.

Q. All right. Where were the other men?

[fol. 28] A. They were in the back of the sand—on the sand pile with sand scoopers, back of the machine, scooping sand.

Q. What were the so-called point men, the ones operating the points, where would they be?

A. They would be up the line.

Q. Depending on where the work was to be done?

A. Yes, sir.

Q. All right. Now how many men did you have in your crew or gang out there that day?

A. Fourteen.

Q. Fourteen?
A. Yes, sir.
Q. All right. You may take your seat.
A. (Witness resumes the stand)
Q. What time of day did you go to work that morning?
A. 8:00 o'clock.
Q. Where did you leave from?
A. I left—
Q. Where did you get Claude Baker?
A. I picked him up at Crandall.
Q. Did he seem to be in good spirits that morning?
A. Yes, sir.
Q. Notice anything wrong with him that morning?
A. No, sir.
Q. And did you—several of you ride to work together?
[fol. 29] A. Yes, sir.
Q. Who was it rode in the car with you?
A. Me and two boys of mine and my brother and Pavan Churchill, and different ones.

The Court: Can the jury hear?

A. Pavan Churchill.

The Court: If you can't hear, let us know.

Q. Did all of you live down there in the vicinity of Crandall?
A. Yes, sir.
Q. That rode in the car with you?
A. Yes, sir.
Q. Now, how close was this machine that you worked on, that Claude worked on, located to the tracks?
A. Six feet.
Q. And that was in the—which track, Eastbound or Westbound?
A. It was the South tracks.
Q. The South tracks?
A. Yes, sir.
Q. That, then, would be the tracks going in which direction out there?
A. Well, most of the time East.

Q. All right. After Claude was through emptying his sacks of cement, what did he do with his sacks?

[fol. 30] A. Sometimes he would throw them down to his feet and pile up a pile and then walk across the tracks, both tracks, and pile them up over there.

Q. What did they do with them?

A. Burn them.

Q. Now when you say walk across both tracks, which direction would he walk with the sacks?

A. North.

Q. He would cross—

A. Northwest.

Q. He would cross then the South track first and then the North track?

A. Yes, sir.

Q. Tell the jury whether or not that is the way he generally did it out there?

A. Well, he would always pile up some and other times he would take one at a time across.

Q. All right. Did you have an inspector?

A. Yes, sir.

Q. Out there on that job?

A. Yes, sir.

Q. What was his name?

A. R. L. Slaton.

Q. And who did he work for?

A. T & P Railroad, I understood.

[fol. 31] Q. Was he out there on the job all of the time or substantially all of the time that you worked out there?

A. Yes, sir.

Q. Was he there in the morning when you got there?

A. Yes, sir.

Q. And he would leave when you left in the evening?

A. Yes, sir.

Q. Generally?

A. Yes, sir.

Q. I will ask you if Mr. Slaton ever gave you any instructions about the work?

A. Yes, sir.

Q. And what, if anything, did he say to you or instructions did he give you with reference to the points?

A. Well, he seen the grout places fill up and he would tell them to move them.

Q. The grout places?

A. Yes, sir.

Q. Now, what do you mean by that?

A. Well, if the ground filled up in one place he would tell them to move the points to another location.

Q. Did anybody else tell the men operating the points to do that?

A. If something happened Mr. Slaton wasn't there, Mr. Roskydoll would.

[fol. 32] Q. When Mr. Slaton was there, was he the one that told them when to move the points?

A. Yes, sir.

Q. Did he give you any other instructions with reference to points?

A. He told us to thicken or thin the grout, if it got too thick or too thin, have to regulate that.

Q. How would you regulate that?

A. By putting in less water or more.

Q. If he was there on the job and saw that it was too thin, what would he say to you?

A. Tell me to thicken it up a little.

Q. Did he tell you that?

A. Yes, sir.

Q. Were you the man that regulated that?

A. Yes, sir.

Q. And if it was too thick what would he tell you to do then, Mr. Baker?

A. Thin it up some.

Q. During the time that you worked out there, who was it that would mark off the points or direct where the points were to be driven in the ground?

A. Mr. Slaton.

Q. Did anybody else at any time while you were out there ever mark off the points where the—mark off the [fol. 33] places where the points were to be driven in the ground?

A. No, sir.

Q. Was the selection of the places where the points would be put in the ground left solely up to Mr. Slaton?

A. Yes, sir.

Mr. Case: Now, if the Court please, I object to Mr. Baker leading the witness.

The Court: Don't lead the witness.

Mr. Baker: All right.

Q. Did anybody else at all out there ever tell you where to drive the points other than Mr. Slaton?

A. No, sir.

Q. How would he go about marking or direction the points where—the place where the points were to be placed?

A. Take a piece of chalk and mark the ties.

Q. Where would you drive these points; did you drive them in between the rails or where?

A. From four to six feet on each end of the tie, outside the rail.

Q. Did you ever do it any different than that?

A. Yes, sir; at times we put it in between the tracks.

Q. But—between the—

A. Two lines.

Q. Between the two lines?

A. Yes, sir.

[fol. 34] Q. What I am asking you in particular about is, so far as you recall did you ever put the points between the two rails on the track going in one direction?

A. No, sir.

Q. What instruction, if any, had ever been issued to you by Mr. Roskydoll or anybody with W. H. Nichols and Company about following orders of Mr. Slaton?

A. We were told to obey his orders.

Q. Did you do that?

A. Yes, sir.

Q. Did the other men out there on this same machine you were working on obey him?

A. Yes, sir.

Q. This accident took place about what time of day?

A. 8:35.

Q. What was the—did you—strike that question. Did you ever see a train approaching from Dallas travelling West?

A. I seen the Westbound train.

Q. Yes, sir; that is what I am asking you about, and where were you at that time?

A. On the machine.

Q. Facing which direction?

A. Southwest.

Q. What was it that directed your attention to that Westbound train?

[fol. 35] A. Whistle.

Q. And about where was that Westbound train when you first saw it?

A. I judge it was about five hundred feet.

Q. To the West of you—to the East of you?

A. To the East of me.

Q. All right. And where was Claude Baker at that time?

A. He was—

Q. If you know?

A. At the machine.

Q. And what was he doing?

A. He was bent over emptying a sack of cement when I turned him—I turned around and told him a train was coming, and he stuck up one finger and told me he seen it.

Q. And which direction—strike that question. Did you ever see a train approaching from the West travelling East?

A. No, sir; not until it got to about thirty foot of us.

Q. About thirty feet of you?

A. Yes, sir.

Q. Where was Claude at that time?

A. Standing by the side of the machine.

Q. Had he finished emptying his sack of cement?

A. Yes, sir.

Q. Where was the empty sack?

A. He had it in his hand.

[fol. 36] Q. Which direction was he facing?

A. I would say it was more North now than it was any other direction.

Q. All right. Up until that time had you ever heard any whistle from the Eastbound train?

A. I had heard one.

Q. From the Eastbound train?

A. No, sir; no, sir; not from the Eastbound; no, sir.

Q. Were you yourself aware of the approach of the Eastbound train until it got within thirty feet of you?

A. No, sir.

Q. Do you know what it was that directed your attention to the Eastbound train?

A. I just happened to look around and seen it, is all I can recall.

Q. When you saw the Eastbound train what did you do?

A. I turned around and tried to get hold of Claude and pull him away from the track.

Q. And he was looking in which direction at that time?

A. I would say it was North.

Q. Were you able to get hold of him?

A. No, sir.

Q. What happened?

A. My feet slipped out from under me and I fell.

Q. Where did you fall?

[fol. 37] A. Down beside the train.

Q. What happened to Claude?

A. The train knocked him into a water tank and he fell there at the end of the water tank.

Q. Were you in a position to where you could have heard the Eastbound train had it blown a whistle?

A. Yes, sir.

Q. Did you ever hear any bell on the Eastbound train?

A. No, sir; no.

Q. At the time you first saw the Eastbound train, where was the Westbound train?

A. It was about halfway by.

Q. Mr. Baker, if a train goes by there, does it make any noise?

A. Yes, sir.

Q. How much noise does it make?

A. It makes a whole lot of noise.

Q. The machine that you have there, does it make any noise?

A. A right smart, yes, sir.

Q. Did you have an opportunity to observe the speed at which the Eastbound train was travelling?

A. I judge thirty-five to forty miles an hour.

Q. Did it come to a stop?

[fol. 38] A. Yes, sir.

Q. Where did it come to a stop?

A. Last post about a hundred and fifty feet past the machine.

Q. Did it come to a quick stop or a gradual stop, or what about it?

A. Gradual stop.

Q. Did you go to Claude Baker immediately?

A. Yes, sir.

Q. Where was he?

A. Laying over by the end of the water tank.

Q. And could you point out on this photograph, please, where he was?

A. (Witness leaves stand and indicates) Right here.

Q. On the East side of the tanks?

A. Yes, sir.

Q. All right.

A. (Witness resumes stand)

Q. When you got to him what did you notice about him?

A. Well, he had a hole knocked in his head here (indicating), about the worst place I seen.

Q. Was he conscious?

A. No, sir.

Q. Did you do anything for him?

A. Nothing only washed his face.

[fol. 39] Q. Did he regain consciousness there at any time?

A. At one time.

Q. What else, if anything, did you do there for him?

A. Well, we gave him some ammonia and brought him around and I asked him how he felt and he said he wasn't hurt bad and passed out again.

Q. What did you do then?

A. We took him down the dump and waited for the ambulance to get there.

Q. And what do you mean by dump?

A. We took him off of the right of way.

Q. I notice in Plaintiff's Exhibit No. 2 some stopped cars; can you see these cars back here?

A. Yes, sir.

Q. And where did you take him with reference to where the cars are?

A. (Witness leaves stand) We taken him right straight down from the water tank off of the right of way.

Q. All right, and then did the ambulance come over there through the field?

A. Yes, sir.

Q. Or meadow, whatever that is?

A. The field.

Q. All right.

A. (Witness resumes stand)

[fol. 40] Q. Did he regain consciousness after you got him down to the field?

A. No, sir.

Q. Did you go to the hospital?

A. No, sir.

Q. Who went with him?

A. Joe Roskydoll.

Q. That was your foreman?

A. Yes, sir.

Q. Did you continue working that same day?

A. We worked until we heard he was dead and we shut down and went home.

Q. And about what part of the week was that—do you remember?

A. Wednesday.

Q. Did you work any more that week?

A. No, sir.

Q. When did you come back to work?

A. Monday morning.

Q. I will ask you, Mr. Baker, whether or not you or anyone else on the job, so far as you know, signed any sort of statement that day he was killed?

A. No, sir.

Q. Did you talk to someone or make a statement later?

A. Yes, sir.

[fol. 41] Q. And when was that?

A. Monday.

Q. The following Monday?

A. Yes, sir.

Q. And was the time these pictures were made?

A. Yes, sir.

Q. Did either one of your sons work out there after this accident?

A. No, sir.

Q. They shut the machine down?

A. Yes, sir.

Q. During the time that you worked out there, did the trains, as they would approach and come into the area there in the green flags where you all were working blow the whistles or not?

A. Yes, sir; most of the time.

Q. Did you all rely on the whistles?

A. Yes, sir.

Q. What about the bell?

A. Well, we relied on the bells and the whistles both.

Q. Did the Westbound train come to a stop?

A. No, sir.

Q. Mr. Baker, after that Eastbound train had gotten within a hundred and fifty or two hundred fifty feet of the point where you were work, if it had blown the whistle could [fol. 42] you have gotten to Claude?

A. Yes, sir.

Mr. Baker: I believe that is all.

Cross examination.

By Mr. Case:

Q. Mr. Baker, when did you first start working for W. H. Nichols & Company?

A. It was either 1949 or 1950; I am not sure.

Q. And did you hire out as a machine operator when you first went to work for them?

A. No, sir.

Q. What sort of work did you first do?

A. Scooping sand.

Q. Who was your foreman when you first went to work for them?

A. Fred Roben.

Q. All right. Did you work for them continuously from 1949 up until this accident happened?

A. Off and on.

Q. Off and on?

A. Yes, sir.

Q. Had you worked for Nichols & Company most of the time—

A. Yes, sir.

Q. From 1949 until this accident happened?

[fol. 43] A. Yes, sir.

Q. And on the day that this accident happened, who was Nichols' foreman on the machine you were working on?

A. Joe Roskydoll.

Q. Was he your boss?

A. Yes, sir.

Q. Did he tell you when to come to work and what to do?

A. Yes, sir.

Q. When to quit?

A. Yes, sir.

Q. When the machine was going to be moved?

A. Yes, sir.

Q. Joe Roskydoll gave you all of your instructions about the work you were to do and how to do it, didn't he?

A. Except what Mr. Slaton told us.

Q. All right, now, what did Mr. Slaton give you instructions on, did you say?

A. Well, where to drive the points and how to mix the grout.

Q. And what else?

A. Well, if a machine needed moving back away from the track he would tell us to move it and get it away from the rails farther.

Q. He told you these things?

A. Yes, sir.

[fol. 44] Q. That is Mr. Slaton, the T & P inspector?

A. Yes, sir.

Q. He told you where to drive the points?

A. Yes, sir.

Q. Told you personally?

A. No.

Q. He didn't tell you that?

A. He told the point men that; that was his job out there, to do—

Q. That is not what I asked you. I said, did he tell you personally?

A. He used to when I was a point man.

Q. All right. He told you personally how to mix the grout, you say?

A. Yes, sir.

Q. In other words, how much sand and how much cement and how much water?

A. Yes, sir.

Q. He told you personally where to move the machines to or move them back from the tracks?

A. Yes, sir.

Q. Now, Mr. Baker, when this case was tried about a year and a half ago you didn't tell us—you didn't—you testified, didn't you?

A. Yes, sir.

[fol. 45] Q. I hand you here your testimony in the former trial and call your attention to the testimony of—you are Tom Baker, aren't you?

A. Yes.

Q. You are the same Tom Baker that testified then, are you not?

A. Yes; I hope I am.

Q. You were the first witness called by the Plaintiff, weren't you?

A. Yes, sir.

Q. I ask you, Mr. Baker, to look on page 18 of the statement of facts and read out so the jury can hear you.

A. I can't see it from here.

Q. All right; get it where you can see it and start right here (indicating), starting with the questions and answers down to the—to there (indicating).

A. "Did Mr. Slaton give you instructions in connection with the work? Yes, sir. What would Mr. Slaton tell you to do? He would show us the location to put the point and other—in other words, where you would—should drive the pipe? Yes, sir. And would he give you any other instructions? No, sir."

Q. All right. On the other trial, then, you testified that all Mr. Slaton ever told you to do was where to drive the points, didn't you?

A. That was when I was a point man, I guess, the way I [fol. 46] had it.

Q. All right. You did say that he never did give you any other instructions, didn't you?

A. Yes, sir.

Q. All right. When did you decide, now, since the other trial that he gave you some other instructions?

A. That is the way it was.

Q. Which, the way you testified in the other trial or the way you testified here?

A. It has been so long I have done forgot.

Q. All right, sir. You admit that on the other trial you testified that all he ever told you was where to drive the points, don't you?

A. That is when I was point man, I guess.

Q. All right. You want to take time to read through here and see if you can find where he gave you—where you said he gave you any other instructions?

A. No, sir.

Q. You don't?

A. If it wasn't in there you wouldn't offer it to me.

Q. All right. Who paid you your pay for working out there, Mr. Baker?

A. W. H. Nichols.

Q. Who deducted your Income Tax?

A. W. H. Nichols.

[fol. 47] Q. Who deducted your Social Security Taxes?

A. W. H. Nichols.

Q. T & P never did pay you anything, did they?

A. No, sir.

Q. They never did make any deductions from your salary, did they?

A. No, sir.

Q. And they didn't tell you when to come to work, did they, the T & P?

A. No, sir.

Q. T & P didn't tell you when to quit work?

A. No, sir.

Q. As a matter of fact, you considered yourself an employee of Nichols, didn't you?

A. I was.

Q. You don't think you were ever employee of the T & P out there?

Mr. Baker: If the Court please—

A. No, sir.

Mr. Baker: We object to that because that involves a mixed question of law and fact.

Mr. Case: I can ask him what he considers—

The Court: I will overrule the objection.

Mr. Baker: Note our exception.

Q. You don't think you were ever an employee of the [fol. 48] T & P out there, do you?

A. No, sir.

Mr. Baker: Same objection to all of this.

The Court: Yes; you may have your objection.

Q. And you and Claude Baker worked for the same outfit, didn't you?

A. Yes, sir.

Q. And had been for a good while?

A. Yes, sir.

Q. As a matter of fact, sometime later because and someone on Nichols' crew got in some sort of squabble and you got fired, didn't you?

A. Yes, sir.

Q. And who fired you?

A. The shop foreman.

Q. The shop foreman for what company?

A. W. H. Nichols.

Q. And what man hired you to go to work for W. H. Nichols & Company?

A. At the time I hired out, it was Fred Roben.

Q. And who did he work for?

A. W. H. Nichols.

Q. All right. Now, then, Mr. Baker, there are two sets of railroad tracks out there at this location, weren't there?

A. Yes, sir.

[fol. 49] Q. On the day that you were testifying about the Westbound train was a passenger train, wasn't it?

A. Yes, sir.

Q. And the Eastbound train that struck Claude Baker was a passenger train, wasn't it?

A. Yes, sir.

Q. How long had you been working at about this location before the accident happened?

A. I don't remember.

Q. Several months, wasn't it?

A. Well, we worked from West Dallas to Fort Worth before the job was finished.

Q. All right, but you had been in this same general area for a good while before the accident happened, hadn't you?

A. Yes, sir.

Q. Claude Baker had been working there for a good while in this same general location, hadn't he?

A. Yes, sir.

Q. These two passenger trains that passed on the morning of the accident came by every morning, didn't they?

A. Yes, but that was the first time I ever seen them meet at that location.

Q. All right. They came by about the same time every morning, didn't they?

A. Yes, sir.

[fol. 50] Q. As far as you could tell they were regularly scheduled passenger trains?

A. Yes.

Q. As a matter of fact, Mr. Baker, sometimes the Eastbound train was on the South set of tracks and sometimes it would be on the North, wouldn't it?

A. Yes, sir.

Q. And sometimes the Westbound train would be on the North tracks and sometimes on the South tracks, wouldn't it?

A. Yes, sir.

Q. And the fact that one set of tracks was on the South didn't mean any particular train was going to go in any particular direction, did it?

A. No, sir.

Q. You didn't know which direction the train was going until you looked, did you?

A. No, sir.

Q. And sometimes the Eastbound train would pass the

Westbound train with the East train on the North track and the West train on the South track, wouldn't it?

A. Yes, sir.

Q. Now, these green flags that you told Mr. Baker about, were they—were two green flags located on the South side of the track and two on the North side close to your machine or—?

A. No, sir; they were all in the middle of each rail—[fol. 51] I mean, in between the two sets of rails.

Q. All right, and one of them was about how far East of your machine?

A. A hundred and fifty feet.

Q. And how far was it then to the West one West of your machine?

A. Hundred and fifty feet.

Q. All right. Mr. Baker, would you mind stepping down here, please, sir?

A. (Witness leaves stand)

Q. This is a picture which has been marked Plaintiff's Exhibit 4 and you have testified earlier about it in the trial—is that correct?

A. Yes, sir.

Q. Now, the machine closest to you here is the East machine, the one you and Claude were working on?

A. Yes, sir.

Q. And one on up here down there is the West machine?

A. Yes, sir.

Q. And an over toward the West machine, that is looking toward the West?

A. Yes, sir.

Q. Now, that track, the West track, is perfectly straight there, isn't it, for at least a mile?

A. Yes, sir.

[fol. 52] Q. And the track is level, isn't it?

A. Yes, sir.

Q. And if a man stood here and looked to the West there is no reason in the world why a man couldn't see down there for at least a mile and see a train on that West track?

A. If he had been looking.

Q. All right. And you say that the trains might be coming on either track at any time, isn't that correct?

A. Yes, sir; that's right.

Q. Claude Baker was a grown man, wasn't he?

A. Yes, sir.

Q. How old was he?

A. Fifty-four, or six.

Q. And he had been working doing this sort of work for approximately how long to your knowledge?

A. Four or five years.

Q. You knew from your experience that there was liable to be a train on a railroad track at any time, didn't you?

A. Yes, but we was standing—

Q. That is not what I asked you. You say here, if you didn't hear a whistle you would just strike out across a track without looking?

A. Yes.

Q. You would?

A. I would.

[fol. 53] Q. Uh huh. You might get hit, too.

A. I could have.

Q. All right. All right, and this train that hit Claude Baker was coming on this track right here (indicating)?

A. Yes, sir.

Q. And there wasn't anything in the world to obstruct Claude Baker's view on the left when he was out here, was there (indicating)—

A. No, sir.

Q. When he was standing completely clear of the track; he could have seen the train coming, down here (indicating), couldn't he?

A. If he had looked.

Q. If he had been looking he would have seen it at a place where he was in no danger of being hit—is that correct?

A. Yes, sir.

Q. All right. Take your seat again, please?

A. (Witness resumes stand)

Q. In the business you were working in at that time, what did the term "hot rail" mean?

A. Meant there was a train approaching.

Q. And who generally hollered "hot rail"?

A. The first man that seen it.

Q. By the first man, do you mean Nichols' employees?

A. Yes, sir.

[fol. 54] Q. On this morning did you hear anyone holler "hot rail"?

A. No, sir.

Q. You didn't hear a soul holler "hot rail"?

A. No, sir.

Q. All right. Before either of the trains got there, was there anyone working out on the tracks or between the tracks?

A. Yes, sir.

Q. Did anyone get hit besides Claude Baker?

A. No, sir.

Q. Those people got out of the way, didn't they?

A. Well, they didn't have to work up on the tracks.

Q. Well, you said there was some on the tracks and they got out of the way?

A. I said they were—South, on the South side of the tracks, out there.

Q. Oh, now you are saying that there was no one out between the tracks?

A. No, sir.

Q. Not a soul out there before the trains approached?

A. There might have been out there, but they wasn't there when the train came by.

Q. They got out of the way before the train got there, didn't they?

A. I didn't see anyone out there.

Q. Well, where was Slaton this morning?

[fol. 55] A. I don't remember.

Q. All right. Who was Nichols superintendent at that time out there?

A. Mr. Miller.

Q. All right. Was he out there that morning?

A. Yes.

Q. Did you see him just before the trains came by?

A. He was down off of the right of way.

Q. He never was up on the right of way?

A. No, sir.

Q. That is your testimony?

A. Yes, sir.

Q. All right. Where was Joe Roskydoll?
A. He was down at the air compressor with Mr. Miller.
Q. Where is the air compressor?
A. I believe it was off of the right of way to the South.
Q. He was never up on the dump at all?
A. Mr. Roskydoll?
Q. Yes.
A. He had been up there but he went down the dump.
Q. And where were the other men—where was Mr. Roskydoll when the trains—were the trains in sight when he went down there down the dump?
A. No, sir.
Q. All right. It is your testimony that no one out there [fol. 56] hollered "hot rail" that morning?
A. No, sir; I didn't hear anybody.
Q. Uh huh, and was your machine operating at that time?
A. Yes, sir.
Q. You say it makes some noise?
A. Yes, sir.
Q. And did you hear anyone; would you say that no one did holler "hot rail" or you just didn't hear it?
A. I didn't hear anyone.
Q. And if someone else testifies that they did you wouldn't dispute that?

Mr. Baker: If the Court please, we will object to that.
The Court: I sustain the objection.

Q. All right. Now, you say that this Westbound train was about half way down to this machine West of you when you first saw the Eastbound train—is that right?
A. About half of the train had passed us when the Eastbound—when the Eastbound come in.
Q. All right. When you saw the Eastbound train when it was about thirty feet from you—is that about right?
A. Yes, sir.
Q. Would you say, and at that time that you saw the Eastbound train—come down here again, please, sir?
A. (Witness leaves stand)
Q. This is Plaintiff's Exhibit 4. At the time you saw [fol. 57] the Eastbound train you were sitting on this seat here (indicating)—is that right?

A. Yes, sir.

Q. And now then from the time you saw it, just tell the jury again everything you did?

A. Well, I turned around and tried to get a hold of him.

Q. Wait just a minute. Which way did you turn, to your right?

A. To my left.

Q. To your left?

A. I had turned all the way around.

Q. Now, Mr. Baker, Claude Baker normally worked on your right, didn't he?

A. Right back here (indicating).

Q. And that would be to your right where you were sitting, wouldn't it?

A. Yes.

Q. Well, when did he move to get over to your left?

A. I don't know.

Q. You didn't see him move?

A. No, sir.

Q. And you wouldn't say he didn't move, would you?

A. No, sir.

Q. He normally would be working over to your right?

A. Yes, sir.

[fol. 58] Q. And normally which direction would he be facing while he was working?

A. Well, he would be facing the East.

Q. Be facing East?

A. Yes, sir.

Q. And he would be around over here sort of behind and to the West side of the machine, wouldn't he?

A. Yes, sir; right back here (indicating).

Q. And in order for him to get around to your left he would have to turn and look sort of toward the tracks to get over here (indicating), and walk that way, wouldn't he?

A. Yes, sir.

Q. All right, and at some time from the last time you saw him going over to your right, up until the time you saw this Eastbound train thirty feet away, why, he had turned toward the track and walked down to the East?

A. Yes; three or four steps.

Q. All right. He was three or four steps to the left?

A. Yes, sir.

Q. How many steps—

A. Three or four steps from where he started from back here (indicating), the other side of the machine.

Q. All right. Now, are you pointing to this as being his regular place to work?

A. Back here (indicating).

[fol. 59] Q. All right. Let's get another picture. Let's get Plaintiff's Exhibit No. 1. I guess this is it. Were you talking about over here? Here is a man bent over here (indicating); what is he doing?

A. Working on the sprocket chain—chain sprocket.

Q. Use this picture and show the jury where Claude Baker would normally be when he was working.

A. Back here between the buckets.

Q. Right by this bucket over here?

A. Yes, sir.

Q. That would be on the West end of the machine?

A. Yes, sir.

Q. And you were sitting up here right under where this "T" is marked here, weren't you?

A. Yes, sir.

Q. And had you noticed Claude Baker had been working there just before these trains came by—hadn't he?

A. Yes.

Q. And you didn't see him turn and walk from here and all the way to the East until he got three steps from this, did you, here (indicating)?

A. He walked right along there (indicating) when I seen him first.

Q. Did you look to your right there?

A. No; to the left.

[fol. 60] Q. You are saying you were facing South, weren't you?

A. Right here by these sacks.

Q. Well, I say, that would be—

A. I had turned all the way around to the left.

Q. All right. You didn't see which way he turned and which way he looked to get over there?

A. No, sir.

Q. All right. When he started by this hopper or bucket,

he started across toward the tracks, there was no reason why he wouldn't have seen that Eastbound train, is there, if he had just looked?

A. If he had just looked.

Q. Uh huh. And now then as you turned you saw the train, as you were turning to your right?

A. Right, when I saw the train, then I turned.

Q. Right.

A. Yes, sir.

Q. And which way did you turn, did you swing around toward the track or around away from the track?

A. Swung around away from the tracks to the left.

Q. All right. Is this seat up here on a pivot?

A. Yes, sir. No.

Q. Where it will turn?

A. No, sir. No, sir.

Q. It doesn't? Which hand did you grab for Claude Baker [fol. 61] with?

A. With my left hand.

Q. All right. You first saw this train, you see, thirty feet West—

A. Yes, sir.

Q. —of this machine (indicating)?

A. Yes, sir.

Q. And then you swung your head from looking at the train around to the South and back toward the East—is that right, sir?

A. Yes, sir.

Q. Did you do that immediately on seeing the train?

A. Yes.

Q. And you grabbed out for Claude Baker with your left hand?

A. Yes, sir.

Q. And you missed him?

A. Yes, sir.

Q. Did you say anything to him or just grab for him?

A. Hollered, "Look out".

Q. Now, you testified while ago you hollered "look out"; did you holler twice or just one time?

A. I don't remember. One time.

Q. You just remember one time?

A. Yes.

[fol. 62] Q. So that is all you remember. Was he moving or standing still at that time when you grabbed for him?

A. Up until that time?

Q. When you stuck your hand out to grab for him and hollered at him, was he moving or standing still at that time?

A. He was standing still at that time.

Q. He was standing still at that time; all right; was he standing on the ties or away from the ties?

A. He was standing on the ties.

Q. On the ties?

A. Yes, sir.

Q. And you know from observing trains passing out there that the overhang of the train hangs over the ties, don't you?

A. They don't hang over much.

Q. Well, the coaches and engine, does part of the train stick out over the ties?

A. Yes, sir.

Q. That's right.

A. That's right.

Q. And a man standing on the ties is apt to get hit when a train is coming by?

A. Yes, sir.

Q. All right. When you reached around and grabbed him with your left hand you missed him?

A. Yes, sir.

[fol. 63] Q. And your feet slipped out from under you?

A. Yes, sir.

Q. And you fell to the ground?

A. Yes, sir.

Q. Did you fall forward?

A. Yes, sir.

Q. You fell on your stomach?

A. (Answer of witness at jury rail not understood by Reporter).

Q. I say, you were sprawling out on the ground?

A. Yes, sir.

A. Yes, sir.

Q. All right. You fell right here between the ties and the machine, is that right?

A. Yes, sir.

Q. And when you got up was the train stopped?

A. No, sir; it was pulling on out.

Q. All right. You say you saw the train stop about a hundred and fifty feet from your machine?

A. Yes, sir.

Q. All right. And you are telling the jury that from the actions you have just described and getting a glimpse of the train, turning your attention all the way away from the train and falling to the ground and then when you got up the train was stopping, that you could estimate the rate of speed at which it was going?

[fol. 64] A. No, sir; I didn't tell you the train was stopping; I said it was pulling on out.

Q. All right. How much of the train was by you?

A. When I got up?

Q. Yes.

A. Just the unit pulling it.

Q. Just the engine?

A. Yes, sir.

Q. Had you heard the brakes go into effect?

A. No, sir.

Q. Well, did you continue watching the train or did you continue watching Claude?

A. I was watching Claude to see what happened to him.

Q. Or were you paying any attention to the train or were you watching to see what happened to him?

A. Yes; most of the time.

Q. All right, and where was he?

A. He was right here (indicating)—well, there is another picture over there.

Q. Is it this one, sir?

A. Yes, sir.

Q. All right. This is Plaintiff's Exhibit 3.

A. Between these water tanks and the machine there.

Q. All right.

[fol. 65] A. I was laying between these water tanks and the machine there.

Q. All right, sir. You say you saw Claude get hit?

A. Yes, sir.

Q. And that was while you were—after you had fallen?

A. No; I hadn't fell until after he got hit.

Q. Oh, you mean you fell off of the machine after he got hit?

A. Yes.

Q. You fell to the ground?

A. Fell to my knees.

Q. And got up just as quick as you could and ran to Claude, didn't you?

A. That's right.

Q. And you were paying attention to Claude and not that train, weren't you?

A. I was excited; I don't know what I was watching.

Q. You don't know what you were watching; you don't know or have any idea really how fast the train was going, did you? Take the stand.

A. (Witness resumes stand.)

Q. Is that right?

A. I guess.

Q. All right. Are you telling the jury definitely the whistle or horn wasn't sounded on that Eastbound train or [fol. 66] you just telling them you didn't hear it?

A. I didn't hear it.

Q. You won't say that it wasn't sounded, will you?

A. No, sir.

Q. You won't say that the bell wasn't ringing, will you?

A. No, sir.

Q. You were excited, weren't you?

A. After the train hit him, I was.

Q. Well, you weren't paying any attention to the train until about the time it hit him, were you?

A. No, sir.

Q. And when you first paid any attention to the train you were pretty excited, weren't you?

A. Well, I said, after I seen it hit him, well—

Q. And it hit him like that (counsel snaps fingers) after you first saw him, didn't it?

A. Yes, sir.

Q. And from that time on you were a pretty excited man, weren't you?

A. Yes, sir.

Q. All right. Now, then, do you know who the foreman was with the grouting machine that was down to the West of you?

A. Yes, sir.

Q. Who was it?

A. H. C. Snodgrass.

[fol. 67] Q. Do you know who Bill Dillisaw is?

A. Yes.

Q. Was he one of them out there?

A. Yes, sir.

Q. Who was he?

A. Boy from Louisiana.

Q. Was he working for Nichols when this happened?

A. Yes.

Q. What was his job?

A. I don't know. He was working on the other gang.

Q. Did you see him out there that day?

A. I don't remember if I did.

Q. Well, do you know whether H. C. Snodgrass was out there that day?

A. No, sir.

Q. You don't know?

A. No, sir; we were six hundred feet apart and I don't know who was up there.

Q. All right. Now, you say that when you saw Claude Baker standing there to the left of you where you were sitting that he was facing to the North?

A. Yes, sir.

Q. And when he was facing to the North he was looking out across both sets of tracks, wasn't he?

A. About in an angling position.

[fol. 68] Q. Well, he was looking out across both sets of these tracks shown here in Plaintiff's Exhibit 3, wasn't he?

A. Yes, sir.

Q. All right. With absolutely nothing to keep him from seeing to the left if he looked—is that right?

A. No, sir.

Q. And you say that you didn't hear anybody holler "hot rail" that morning?

A. No, sir.

Q. Now, Mr. Baker, let me refresh your memory. Your testimony in the former trial—I want you to look at it while I read it to the jury.

Mr. Baker: What page is that, please, sir?

Mr. Case: Page 40.

Q. "They hollered hot rail that morning, didn't they", and you answered, "Yes, sir." Didn't you?

A. Yes, sir.

Q. "Several of them repeated 'hot rail', didn't they", and you answered, "Yes, sir", didn't you?

A. Yes, sir.

Q. "They weren't even working over here, were they, where this Westbound train was, were they", and you answered, "No, sir, because we hollered to keep them away from coming over there", is that right?

A. Yes, sir.

[fol. 69] Q. Now, on that former trial you testified that several people did holler hot rail, didn't you?

A. I guess.

Q. All right. What are the facts? Were people hollering hot rail or weren't they?

A. I don't remember.

Q. Well, you said while ago they weren't. Now, which is your testimony, that they were or weren't?

A. I didn't hear anybody.

Q. Well, why did you testify on the former trial that you did hear people holler hot rail?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. How old a man are you, Mr. Baker?

A. Forty-four.

Q. Do you mean to tell this jury that you, who have been working around railroad tracks at least since 1949, would just bust out across a double set of tracks without looking either way if you didn't hear a whistle?

A. Yes, sir.

Q. Were these the only two trains that passed there every day?

A. No, sir.

Q. That is a pretty busy railroad out there, isn't it?

[fol. 70] A. Yes, sir.

Q. Lots of trains coming and going?

A. Yes.

Q. All through the day?

A. That's right.

Mr. Case: That's all.

Re-direct examination.

By Mr. Russell Baker:

Q. Mr. Baker, Mr. Case asked you about your testimony on the last trial, and I believe you started on the bottom of page 17 and he read up through the top of page 18, did he not?

A. I think so.

Q. All right. Let's read the rest of it.

Mr. Case: No, he didn't, as a matter of fact.

Mr. Baker: Well, some pages—some are different.

(Conference between counsel.)

Q. Mine would be 17.

A. Yours would be on 18.

Mr. Case: All right. You don't have all the testimony I have then.

Mr. Baker: I have it but the pages are numbered different.

Q. Now, in any event, regardless of whether the pages are numbered the same, we will get the same testimony that [fol. 71] Mr. Case asked you about. He started out asking you to read your testimony. "Did Mr. Slaton give you any instructions in connection with your work"—

A. Yes.

Q. Your answer was "Yes, sir", wasn't it?

A. Yes, sir.

Q. What would Mr. Slaton tell you to do?", and what was your answer to that there?

A. "He would show us—" —I can't see it.

Q. Mind if I—

A. "He would show us—"; you can read it; I can't.

Mr. Baker: Do you mind if I read his answers?

Mr. Case: Well, is this for the purpose of impeachment?

Mr. Baker: No, sir.

Mr. Case: Well then I suggest that he do it.

Q. All right; you read the answers, then. Get it up there close.

Mr. Case: I object to him reading his answers in any event, unless he is undertaking to impeach his own witness.

Mr. Baker: I am just going to offer the rest of what he offered.

The Court: I will overrule the objection, as long as it is germane to the rest of it.

Mr. Baker: Yes, sir. It is.

[fol. 72] Q. All right, Mr. Baker.

A. "What did Mr. Slaton tell you to do?".

Q. And what was your answer?

A. "He would show us the location to put the points".

Q. All right. What was the next question?

A. "In other words, where you would drive the pipe?"

Q. And what was your answer?

A. "Yes, sir".

Q. All right, and what was the next question?

A. "And would he give you any other instructions?"

Q. And what was your answer?

A. "No, sir".

Q. Now, let's continue reading; what was the next question you were asked?

A. "When you would drive the pipes in the ground would he—would be pumping this cement in there, did you ever have to thin it or thicken it?"

Q. What was your answer?

A. "Yes, sir".

Q. All right, and what was the next question?

A. "Did Mr. Slaton ever give you any instructions about that? Yes".

Q. Now, Mr. Case didn't read that part of your testimony to you while ago, did he?

A. No, sir.

[fol. 73] Q. All right, read the next—

Mr. Case: You want to ask him to read the next one?

Q. Read the next one.

A. "If too thin he would—"

Q. This is the next one (indicating).

A. "What did he say?"

Q. What was your answer?

A. "If too thin he would say thicken it or if too thick he would say thin it".

Q. All right. What was the next question?

A. "And—and how often does that take place?"

Q. What was your answer?

A. "Not too often".

Q. All right. Now, let's turn—let's see. Mr. Case didn't—Mr. Case read from you over on page 29 of my volume; beginning on page 29 would you read the questions you were asked there? It is probably thirty in yours.

Mr. Case: I didn't ask any on 29 or 30.

Mr. Baker: No, sir. While ago you didn't ask him any.

Mr. Case: Huh?

Mr. Baker: You didn't ask him any while ago on 29 or 30.

Mr. Case: Well, I object to him asking about something [fol. 74] that wasn't asked about on direct—

Mr. Baker: It deals with the same thing, your Honor, whether or not any instructions were given him.

The Court: All right. I overrule the objection.

A. This question here?

Q. Yes, sir; begin there. What was the question?

A. "Mr. Baker, you have told us that Mr. Slaton of the T & P were there on the job. Yes, sir".

Q. And what was your answer, "Yes, sir"?

A. Yes, sir.

Q. Yes, sir. All right. Now, what was the next one?

A. "How would you determine where you would drive this pipe or point, as you call them, in the ground?"; "He would mark it off on the end of the ties where he wanted us to put them".

Q. What was the next question?

A. "Now, who would mark off? Mr. Slaton".

Q. What was the answer? I didn't get that; read it again; read the question again right here (indicating).

A. "He would—"

Q. Right here (indicating), now.

A. "Mr. Slaton".

Q. Here is the question just about that, right over it.

A. "How—" I can't even see it. "How would he mark it off?"

[fol. 75] Q. Read it and look at it close, Mr. Baker. Would you read it there with your glasses?

A. "Who would mark it off?"

Q. And what was your answer?

A. "Mr. Slaton".

Q. All right. Read the next question.

A. "Now, did Mr. Roskydoll ever mark it off on the ties?"

Q. And what was your answer?

A. "No, sir".

Q. All right. Now, on page 31. Beginning right here (indicating), what was the question that you were asked, line 7, page 31?

A. "Did Mr. Slaton give you any instructions with reference to the amount of sand?"

Q. Speak up, please, sir?

A. "Or cement—or cement you would put in the hopper there?"

Q. And then what was the next question?

A. "What instructions, if any, did he give you as he—how you would mix it?"

Q. What was the answer?

A. "To keep the bucket full".

Q. The question was what next, then?

A. Do what?

Q. What was your answer?

[fol. 76] A. "To keep the sand bucket full, to keep the sand bucket full".

Q. All right; what was your answer?

A. "Yes, sir".

Q. All right. Mr. Baker, Claude would work back there emptying sacks of cement; did his work require him to bend forward?

A. Yes, sir.

Q. All right. And as he worked there emptying cement into the hopper, which direction would he be facing?

A. East.

Q. All right. You were up on a seat, were you not?

A. Yes, sir.

Q. Were you higher then than Claude Baker?

A. Yes, sir.

Q. —was? And you were facing which direction?

A. Southwest—Southeast.

Q. You could have looked to your right, could you not?

A. Yes, sir; yes.

Q. Because you were above the machine and the pile?

A. Yes, sir.

Q. Did you ever see that train, the Eastbound train, until it was thirty feet away?

A. No, sir.

Q. Is there any reason that you know of why, if that Eastbound train had blown the whistle, you couldn't have heard it?

[fol. 77] A. No, sir.

Q. As you reached around for Claude Baker, could you see the Eastbound train?

A. Not after I started turning to my left there, I couldn't; no, sir.

Q. Did you see it after you turned around any time?

A. Yes, sir; while I was getting down.

Q. Then when you fell, when you fell to the ground there, did you start toward Claude?

A. Yes, sir.

Q. And did you have some opportunity to see and observe that train?

A. Well, some, yes, sir.

Q. And what is your best judgment as to how fast it was going?

A. Thirty-five to forty miles an hour.

Q. Where did it hit Claude?

A. On the shoulder.

Q. At the time it hit Claude, which direction was he looking?

A. In the North.

Q. If you had heard the whistle, any whistle, of the Eastbound train at any time, knowing there was a train coming on the Westbound track, what, if anything, would you have done toward signaling Claude Baker?

[fol. 78] A. I would always signal him and tell him the train was coming.

Q. The area in which you worked, was that a restricted area?

A. Do what?

Q. For trains, was it a protected area?

A. Yes, sir.

Q. And did they move the flags from time to time as you moved the location of your work?

A. Yes, sir.

Q. Is that what the flags were out there for?

A. That is my understanding.

Mr. Baker: That is all.

Recross examination.

By Mr. Case:

Q. Now, Mr. Baker, you tell the jury now that the train was going thirty-five or forty miles an hour and while ago you said you were excited, so excited that you couldn't tell the jury how fast it was going. Which do you mean?

A. Right after—I was excited right after, but that would have been my judgment about it.

Q. That was your excited judgment—is that right?

A. Yes, sir.

Mr. Case: That is all.

[fol. 79] Mr. Baker: That is all. May we excuse Mr. Baker?

Mr. Case: Yes.

The Court: All right; you may go.

(Witness excused)

The Court: Let's take about a ten-minute recess, ladies and gentlemen.

RECESS

The Court: All right. Who will you have next, Mr. Baker?

Mr. Baker: I will have Mr. Billy Ray Baker, and I wanted to ask Mr. Tom Baker just one more question, but I think he went out to get a cold drink.

The Court: Billy Ray Baker. Raise your righthand.

(Witness sworn)

The Court: Take the witness stand.

[fol. 80] BILLY RAY BAKER, the next witness called by the Plaintiff, testified as follows, to-wit, having first been duly sworn:

Direct examination.

By Mr. Russell Baker:

Q. If you would, now, please, Billy Ray, talk out to the last juror over here so that we can all hear you. What is your name?

A. Sir, my name is Billy Ray Baker.

Q. I believe you are going to have to talk a little bit louder.

A. All right.

Q. We will just have to strain to hear. How old are you, please?

A. I am twenty-two.

Q. Where do you live?

A. I live in Terrell, Texas.

Q. Are you presently stationed—a member of the Armed Forces?

A. Yes.

Q. Of the United States?
A. Yes, sir.
[fol. 81] Q. What Branch of the Service are you in?
A. Artillery, sir.
Q. And where are you stationed?
A. Fort Polk, Louisiana.
Q. How long have you been in Service?
A. Nineteen months.
Q. Are you presently home on leave?
A. Yes, sir.
Q. For the purpose of this case. You are the son of Mr. Tom Baker, who has just testified?
A. Yes, sir.
Q. What relationship were you to Claude Baker?
A. I was a second cousin.

* * * * * * *

Q. At the time of his death where were you living?
A. I was living at Crandall, Texas.
Q. And where was Claude and his family living?
A. Crandall, too, sir.
Q. Did both families live on a farm?
A. Yes, sir.
Q. About how far apart did you live?
A. About three miles.

* * * * * * *

Q. Now, were you working when the accident happened at the time Claude got killed?
[fol. 82] A. Yes, sir.
Q. Out there?
A. Yes, sir.
Q. What was your job out there?
A. Well, sir, I was a point man; I worked on the points.
Q. Well, that is this pipe that you drive into the ground; you worked on that?
A. Yes, sir.
Q. How long had you been working out there?
A. Well, sir, I had been working out there from the time the job started there; August 20th—until August 20th when Claude was killed.
Q. Do you remember about when the job started?
A. About April—April 15th.

Q. What year was that?
A. 1952, 1952.
Q. What was Claude's job?
A. Well, sir, his job was cement man.
Q. Did anybody work on the points there with you?
A. Yes, sir.
Q. Who was that?
A. A guy from Louisiana, sir.
Q. Did each point man have a helper?
A. Yes, sir.
Q. What did the helper do for you?
[fol. 83] A. Well, sir, he—pardon me. He drove it in the ground with a big hammer, that point.
Q. What did you do in connection with that?
A. Well, I would watch the points and see when they needed moving and more or less second instructor out there.
Q. And had Claude Baker worked on the same job the whole time he was out there?
A. Yes, sir.
Q. Did you have an inspector out there on the job?
A. Yes, sir.
Q. What was his name?
A. Well, sir, his name was R. L. Slaton.
Q. Was he out there all of the time?
A. Right, sir.
Q. Did he give you any instructions about the work?
A. Yes, sir.
Q. How to do it?
A. He did.
Q. Who would mark or determine the place where the points would be driven in the ground?
A. Mr. Slaton.
Q. Did he give you any other instructions?
A. Yes, sir.
Q. What other instructions did he give you?
A. On moving the points; when one needed moving he [fol. 84] would tell us to move it and instruct us like that.
Q. Anything ever said about the mixture?
A. Yes, sir. He would have them to thicken it up, thin it, whichever it needed.
Q. And who did he tell to do that?

A. Well, he would more or less tell us; the operators of the machines.

Q. Did Mr. Rockydall ever give you any instructions about following Mr. Slaton's orders?

A. Yes, sir; he did.

Q. What instructions did he give you in that respect?

A. Well, he told us to more or less obey Mr. Slaton.

Q. And did you do that?

A. Yes.

Q. At times as you had the points driven in the ground would the cement mixture bubble up on top of the ground?

A. Yes, sir.

Q. Or out to the side?

A. Yes, sir.

Q. When that would happen what, if anything, would Mr. Slaton say to you about it?

A. Well, sir, he would tell us to move it.

Q. To move the point?

A. Right, sir.

Q. Did you have anything to do with selecting the place [fol. 85] where the points would be driven in the ground?

A. No, sir.

Q. Anybody else that was out there in your crew other than Mr. Slaton have anything to do with that that you know of?

A. No, sir.

* * * * * * *

Cross examination.

By Mr. Case:

Q. Is it Private?

A. Sir?

Q. Is it Private First Class or Corporal or what?

A. Corporal.

Q. Corporal. I know you can talk a little louder than you have been talking, then.

A. Yes, sir.

Q. Let's sound off then so everybody can hear you. You were working on the North side on the North set of tracks on the morning of this accident?

A. Yes, sir.

* * * * * * *

Q. Now, you say you went to work out there about April 15th?

A. Yes, sir; something—

Q. Who hired you?

[fol. 86] A. Joe Roskydoll.

Q. And he was foreman for—

A. W. H. Nichols, sir, Company.

Q. And who were you working for?

A. I was working for Joe Roskydoll, the foreman.

Q. Well—

A. W. H. Nichols & Company.

Q. And whose checks did you get when you got paid?

A. W. H. Nichols & Company.

Q. Did they deduct income tax from your checks?

A. Yes, sir.

Q. Nichols did?

A. Yes, sir.

Q. Did they deduct your social security payments from your checks?

A. Yes, sir.

Q. Nichols did that?

A. Yes, sir.

Q. Who told you what time of day to come to work?

A. The foreman, Mr. Roskydoll.

Q. Who told you what time of day to quit?

A. Joe—the foreman, Joe Roskydoll.

Q. Who told you what time of the day you could eat?

A. The foreman.

Q. Joe—

[fol. 87] A. Joe Roskydoll.

Q. Who told you what to do generally in doing your work?

A. Well, sir, ordinarily there was two of them; Joe Roskydoll and Robert Slaton.

Q. All right. When you first went out there and broke in on the job, who was it gave you instructions about how to do the work?

A. The foreman, Joe Roskydoll.

Q. Joe Roskydoll?

A. Yes, sir.

Q. He told you when you first went to work when you were driving points to take the points out when the mixture started coming up out of the ground, didn't he?

A. Yes, sir.

Q. You knew to do that, didn't you?

A. Yes, sir.

Q. Slaton didn't have to come around and tell you every time to pull it up when the mixture came out, did he?

A. Well, sir—Mr. Slaton was more or less up and down the track with us, but we took instructions from Mr. Slaton—

Q. I am just asking—answer the question. Whether Mr. Slaton had to tell you every time to pull the point out of the ground when the mixture started coming up above the ground?

A. Well—

Q. Did he have to do that?

[fol. 88] A. No, sir.

Q. You knew to do that yourself, didn't you?

A. Yes, sir.

Q. And if he ever had to tell you something about that it was just to know that you—because you weren't paying attention to your job, wasn't it?

A. Right, sir.

Q. And you were paying attention to your job all the time, weren't you?

A. Yes, sir; I was; I was paying attention.

Q. Slaton never did have to tell you about this stuff bubbling up out there on the ground?

A. Yes, sir; he—he told us—

Q. Occasionally you just sort of forgot what you were doing and weren't doing your job right, is that right?

A. Well, sir, I was—I was pulling one maybe and there would be another one running out and Mr. Slaton would tell me about it.

Q. Did he talk directly to you or did he talk to Joe Roskydoll about it?

A. He talked directly to me.

Q. He did? All right. Now, then, you didn't consider yourself an employee of T & P Railroad, did you?

A. No.

Mr. Baker: We will object, if the Court please, the ob-
[fol. 89] jection we have heretofore urged.
The Court: I overrule the objection.
Mr. Baker: Exception, please.

Q. You can answer the question now, Billy.
A. Sir?
Q. You didn't consider yourself an employee of T & P Railroad, did you?
A. No, sir; I was employed by W. H. Nichols & Company.
Q. All right. Claude Baker worked for the outfit you did, too, didn't he?
A. Yes, sir.
Q. All right. You considered him an employee of W. H. Nichols Company?

Mr. Baker: Now, if the Court please, we object to that, what he considered Claude Baker, who he considered him to have been working for.
The Court: I sustain the objection to that.

Q. All right. You didn't see anything different about Claude Baker's situation out there as to who he worked for from your situation, did you?
A. Pardon me, sir?
Q. You didn't see anything different about Claude Baker's employment situation from your own employment situation, did you?
A. No, sir; I didn't.
Q. All right. You hadn't heard anything about Claude
[fol. 90] Baker working for T & P, had you?
A. No, sir.
Q. All right. Do you know now that Mrs. Baker over here claims that?
A. Sir?
Q. Do you know that this Mrs. Baker claims Claude Baker worked for T & P?
A. Well, sir—
Q. Just answer yes or no.
A. Yes, sir.
Q. You don't or—what is your answer?
A. No, sir; I don't know it yet.

Q. You don't know it; all right. Now, how old were you when you went to work out there, Billy?

A. I was nineteen, sir.

Q. All right. Had you finished high school?

A. No, sir.

Q. And you say when you first went to work out there Joe Roskydoll instructed you generally about your job, didn't he?

A. He instructed us before we went out—

Q. All right.

A. On the job.

Q. All right. Now, did Joe ever tell you to . . .

. . . . . .

[fol. 91] (Deposition of Grady Williams read into record.)

(Reporter's Note: During reading of above deposition, a small photograph previously marked Plaintiff's Exhibit No. 1 in said deposition, was marked by the reporter for Identification as: Plaintiff's Exhibit No. 5, and same will accompany this transcript.)

[fol. 92] JACK BAKER, the next witness called by the Plaintiff, having first been duly sworn, testified as follows, to-wit:

Direct examination.

By Mr. Russell Baker:

Q. Would you speak out, please, and talk to the last juror over here so that all of us may hear you.

A. Yes, sir.

Q. Give us your name, please.

A. Jack Baker.

Q. And how old are you?

A. Twenty-one.

Q. Where do you live?

A. I live in Terrell.

Q. You are the son of Mr. Tom Baker?

A. Yes, sir.

Q. And who do you work for at the present time?

A. Crown Brick Company at Mesquite.
Q. Who were you working for August 20th, 1952?
A. W. H. Nichols & Company.
Q. Claude Baker worked out there with you?
A. Yes, sir.

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[fol. 93] Q. Where were you all working when you first went to work, out there on the right of way at this same location and area?
A. When I first started to work for the company?
Q. Yes.
A. We—no, sir; we was between Mesquite and Dallas.
Q. And how long did you work down there?
A. I think it was nine months.
Q. And you later went to work out here?
A. Yes, sir.
Q. Did you have a shut-down there for sometime?
A. Well, they moved from Mesquite to Louisiana and I didn't go with them.
Q. During the time that you worked there, I will ask you if Mr. Slaton out there gave you any instructions about the work?
A. Yes.
Q. Who was it that marked the place where you put down the points?
A. Mr. Slaton.
Q. By the way, did you ever put down the points yourself?
A. Yes, sir.
Q. Did you ever fill in for a point man?
A. Yes, sir.
Q. That was not your regular job?
A. No, sir.
[fol. 94] Q. Although on those occasions did Mr. Slaton give you any instructions?
A. Yes, sir; he told us—you know, if it would break out he would tell us to leave the point and if it got too thick to thin it, he would tell my dad—my dad was operator; he would tell him to thin it up.
Q. And Mr. Roskydoll ever give you any instructions about obeying Mr. Slaton?
A. Yes, sir.

Q. And had you followed any orders he gave you from the time you went to work out there?

A. Joe?

Q. Yes; had you followed orders of Mr. Slaton?

A. Yes, sir.

Q. After this accident in which Mr. Baker was killed, I will ask you if Mr. Roskydoll gave you any instructions about what to do when trains were approaching?

A. After the accident?

Q. Yes.

A. Yes, sir; he told us to shut the machine down and get off of the dump.

Q. And to get off the dump?

A. Yes, sir.

Q. And did you do that afterwards?

A. Yes, sir.

[fol. 95] Mr. Baker: I believe that is all.

Cross examination.

By Mr. Case:

Q. Jack, who hired you on the job for the Nichols Company?

A. Joe Roskydoll.

Q. Do you know who he worked for?

A. Joe?

Q. Yes, sir.

A. W. H. Nichols.

Q. Do you know what his job was?

A. Foreman.

Q. In charge of what?

A. In charge of the men and machines.

Q. And he had supervision over the men and the machines?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You are talking about the same machine you were using on the day this accident happened?

A. Yes, sir.

Q. He was your boss?

A. Yes, sir.

Q. He was in charge of you and all of the other men [fol. 96] working on the machine?

A. Yes, sir.

Q. Told you what to do and when to do it, didn't he?

A. Yes, sir.

Q. Told you when to go home? Speak up?

A. Yes, sir.

Q. Told you when to go to work?

A. Yes, sir.

Q. Told you when to take off to eat?

A. Yes, sir.

Q. And when to go home?

A. Yes, sir.

Q. Did you ever quit early some days?

A. Yes, sir; if we had a break-down or something we would quit with that early.

Q. All right. Who told you to go home if you had a break-down?

A. Joe.

Q. All right. Were you paid in cash or by check?

A. By check.

Q. Whose check was it?

A. W. H. Nichols & Company.

Q. Did—were any deductions made for your income taxes out of that?

A. Yes, sir.

[fol. 97] Q. Who deducted that?

A. W. H. Nichols & Company.

Q. Were there any deductions made for any social security?

A. Yes, sir.

Q. Who made those deductions?

A. W. H. Nichols & Company.

Q. Mr. Slaton didn't tell you to go home when one of the machines broke down; Joe Roskydoll was the man that told you, wasn't he?

A. Yes, sir.

Q. Mr. Slaton didn't tell you when to come to work, did he?

A. Yes, sir.

Q. You say yes, sir; you mean he did not?
A. That's right.
Q. Mr. Slaton didn't tell you when to take off to eat, did he?
A. No, sir.
Q. He didn't tell you when to come back from eating, either, did he?
A. No, sir.
Q. He didn't tell you when to quit and go home?
A. No, sir.
Q. He didn't tell you how much pay you were going to get, did he?
[fol. 98] A. No, sir.
Q. Who did you consider you were working for?
A. Joe—

Mr. Baker: If the Court please—

A. —Roskydoll—

Mr. Baker: We object to that.
The Court: I overrule the objection.
Mr. Baker: Note our exception.

Q. Joe Roskydoll?
A. Yes, sir.
Q. And the Nichols Company?
A. Yes, sir.
Q. You never did understand you were working for the T & P Railroad, did you?
A. No, sir.

Mr. Baker: Same objection, if the Court please.
The Court: Overrule the objection.
Mr. Baker: Exception.

Q. Were you working on the same crew as Claude Baker?
A. Yes, sir.
Q. Did you see any difference in his work situation than that of yours? I mean, he was working for the same people you were?
A. Yes, sir.
Q. He took his instructions from the same people you did?
[fol. 99] A. Yes, sir.

Q. All right. Now, how old are you now, Jack?
A. Twenty-one.
Q. How old were you at the time of this accident?
A. Sixteen.
Q. You had been working for the Nichols Company, you said, about nine months off and on, or was it longer than that?
A. I started with them in 1951.
Q. In what part of 1951, Jack?
A. I think it was in March.
Q. All right. And how long did you work for them before they went to Louisiana?
A. About—pretty close to six months.
Q. And that was out around Mesquite?
A. Yes, sir.
Q. Now, when you first went to work out there your foreman, Joe Roskydoll coached you to be careful about trains, didn't he?
A. Yes, sir.

* * * * * * *

[fol. 100] Robert Baker, the next witness called by the Plaintiff, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Russell Baker:

Q. Would you mind giving us your name?
A. Robert Baker.
Q. How old a man are you?
A. Forty-eight.
Q. Where do you live?
A. I live in Terrell, Texas.
Q. You live in Terrell. You are the brother to Tom Baker who has previously testified?
A. Yes, sir.
Q. And you were a first cousin to Claude Baker?
A. Yes, sir.
Q. You and Claude were reared and brought up together?
A. Yes, sir.

Q. So to speak?
A. Yes, sir; brought up together.
Q. And you knew him for a great many years before his death?
A. Yes, sir.

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[fol. 101] Q. Now, were you working with Claude out here at the time he got killed?
A. Yes, sir.

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Q. Now, what was your job out there?
A. Point man.
Q. And I believe that is in the record here that a point man is the man that drives the pipe into the ground through which the cement goes?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. Now, Mr. Baker, where were you working at the time Claude got killed?
A. I was working behind the sand pile on point—on the South side of the track.

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Q. Anybody there with you?
A. Yes, sir. Mr.—
Q. Who was there?
A. Mr. Slaton, Robert Slaton.
Q. What was he doing there with you?
A. He was the inspector.
Q. During the time that you worked out there did Mr. [fol. 102] Slaton give you any instructions?
A. Yes, sir.
Q. What kind of instructions did he give you?
A. Well, to not let it run out on the dump or how to mix the sand.
Q. Did you follow his instructions?
A. Yes, sir.
Q. Had anybody told you to follow his instructions?
A. Yes, sir.
Q. Who was that?
A. Mr. Joe Roskydoll.
Q. And that was your foreman?

A. Yes, sir.
Q. Immediate foreman?
A. Yes.
Q. Now, how did you determine where you would drive this pipe or point into the ground?
A. Well, Mr. Slaton would always show us.
Q. Mr. Slaton would show you?
A. Yes, sir.
Q. Would he sometimes tell you?
A. Yes, sir.
Q. Did he ever mark the ties?
A. Yes, sir.
Q. And do you know what you all had been talking about [fol. 103] or what he had been saying to you or you had been saying to him at that time?
A. No, sir.
Q. On that morning?
A. No, sir; I don't remember.
Q. As you were working there I will ask you if you ever saw a train approaching from Dallas going to Fort Worth?
A. Yes, sir.

* * * * * * *

Cross examination.

By Mr. Case:

* * * * * * *

Q. All right. Who hired you to go to work on that job?
A. Joe Roskydoll.
Q. Who did he work for?
A. He worked for Mr. W. H. Nichols.
Q. All right. Were you on the job when Claude Baker went to work there?
A. Yes, sir.
Q. Or did you come on afterwards?
A. Yes, sir.
Q. Well, you got there first or after him?
A. You mean when I first started out there with Mr. Nichols?
Q. Yes; when you hired out.
[fol. 104] A. No, sir; Claude wasn't there.
Q. You hired out first?
A. Yes.

Q. How long had you been working there when he came to work?

A. About around a month.

Q. Do you know who hired Claude?

A. Yes, sir.

Q. Who?

A. Well, I will say I do. I know the foreman's name was Fred. He lives in Houston.

Q. Who was the foreman for—?

A. For Nichols.

Q. —W. H. Nichols? Did you take Claude up to the foreman at the time he was hired?

A. No, sir; me and the foreman went and got Claude that morning.

Q. You and the foreman went out to Claude's house and got him?

A. Yes, sir.

Q. And he hired him right there?

A. Yes.

Q. That is when they were working out at Mesquite or in West Dallas?

A. Well, we were in Forney between Forney and Terrell.

[fol. 105] Q. All right, and who gave you your pay checks?

A. Well, do you mean—?

Q. Well, when you got paid you got paid by check on that job, didn't you?

A. Yes. Mr. W. H. Nichols.

Q. What was it on, his check, wasn't it?

A. Yes, sir.

Q. And did he hold out your income tax payments out of your pay?

A. Yes, sir.

Q. Did he hold out social security payments out of it?

A. Yes.

Q. Who told you what time of the day to come to work?

A. The foreman.

Q. Who was that?

A. Fred is all I remember.

Q. And at the time you were out there in West Dallas, who was your foreman?

A. Well, part of the time it was Joe Roskydoll and part of the time it was my brother, my brother was foreman.

Q. Which brother was that?
A. Tommy.
Q. All right. And did they tell you what time to come to work?
A. Yes, sir.
[fol. 106] Q. And they tell you what time to take off for lunch?
A. Yes, sir.
Q. Did they tell you what time to come back from lunch?
A. Yes, sir.
Q. Did they tell you what time to knock off in the afternoon?
A. Yes, sir.
Q. Did they tell you what time to come back the next morning?
A. Yes, sir.
Q. Did they tell you how to do your work?
A. Yes, sir.
Q. And show you how to do your work?
A. Yes, sir.
Q. And saw to it that you did your work?
A. Yes, sir.
Q. You are talking about Joe and Fred now?
A. Yes, sir.
Q. All right. Who do you think you were working for?

Mr. Baker: Same objection, if the Court please.

A. Well, W. H.—

The Court: I overrule the objection.
Mr. Baker: Just a minute. Note our exception.

Q. All right; you may answer.
A. Mr. W. H. Nichols.
[fol. 107] Q. All right. You didn't consider you were working for the T & P Railroad, did you?

Mr. Baker: Same objection, if the Court please.
The Court: Overrule the objection.
Mr. Baker: Note our exception.

Q. Did you—?
A. I was working—I thought I was working for the one that was paying me.

Q. And that was W. H. Nichols, wasn't it?
A. Yes, sir.

Mr. Case: That is all; thank you.

Re-direct examination.

By Mr. Baker:

* * * * * * *

Q. Now, was Mr. Slaton out there all of the time?
A. Yes, sir.
Q. And was he out there at the time you would go to work until you quit in the evening?
A. Yes, sir.
Q. Was Mr. Nichols ever out there on the job any?
A. Yes, sir.
Q. And was Mr. Nichols out there at the times when Mr. Slaton would tell you what to do?

Mr. Case: Now, if the Court please, he is leading the [fol. 108] witness again; object to it.
Mr. Baker: I will withdraw it.
The Court: That—all right.
Mr. Baker: That is all. Thank you.
Mr. Case: That is all.

(Witness excused.)

Recess

(Reporter's Note: At this point, deposition of Arthur N. McCullough read into record.) (Shown In Volume II hereof.)

(Reporter's Note: At this point, deposition of Wiley Coleman Allision read into record.) (Shown in Volume II hereof.)

[fol. 109] Dossie Bryant, the next witness called by the Plaintiff, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Robert M. Hill:

Q. What is your name?
A. Dossie Bryant.
Q. Dossie, where do you live?
A. I live at Eagle Ford.
Q. Are you married?
A. Yes, sir.
Q. Where are you working?
A. I work at Parkland Hospital.
Q. How long have you been there at Parkland?
A. Oh, little over a year.
Q. Dossie, I will direct your attention to back in 1952, do you recall when Mr. Claude Baker was killed out there between Dallas and Grand Prairie?
A. Yes, sir.
Q. Now, were you working on that gang?
A. Yes, sir.
Q. And how long had you been in that gang?
A. Oh, about a year.
[fol. 110] Q. And how long had you known Mr. Baker?
A. Well, I have known him ever since I had been working out where we were, around a year.
Q. Now, was he a good hand?
A. Yes, sir.

* * * * * * *

Q. Now, what was your job out there?
A. Well, my job was working on the machine and working the mud strainer, straining mud and roots out of the sand.
Q. You strained roots and what else?
A. Rocks and roots and keep it from going into the cement mixture.
Q. Now, were you all mixing cement and mud together?
A. Yes, sir; sand.
Q. And pumping it out through hoses into the holes in the roadbed?

A. Yes, sir, into the ground.

Q. And it was your job to keep the mixture clean?

A. Yes, sir.

Q. Would you step down here a minute, Dossie, and let me get a picture.

A. (Witness leaves stand.)

Q. Just step over here to the side, Dossie. This is the picture that has been introduced here and that the machine you all were working on?

[fol. 111] A. Yes, sir.

* * * * * * *

(Witness resumes stand.)

* * * * * * *

Q. Now, Dossie, do you remember Mr. Slaton out there?

A. Yes, sir.

Q. He was the T & P man?

A. Yes, sir.

Q. And was he out there all of the time or most of the time?

A. Yes, sir; the biggest part of the time he was out there, yes, sir.

Q. Who was he with out there most of the time?

A. He was with Mr. Joe.

Q. Joe Roskydoll?

A. Yes, sir.

Mr. Hill: All right. That is all.

A. Okay.

Mr. Hill: No; just a minute; he has some questions to ask you.

Cross examination.

By Mr. Case:

* * * * * * *

(Witness excused.)

[fol. 112] (Reporter's Note: At this point, portions of oral deposition of I. N. Malone, were read into the record and admitted into evidence as shown commencing on page 123 hereof.)

[fol. 113] PAVAN CHURCHILL, the next witness called by the Plaintiff, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Russell Baker:

Q. Now, Pavan, if you will, please, talk out; talk to this last juror back over here and we won't have any trouble hearing you this morning.

A. Yes, sir.

Q. What is your name?

A. Pavan Churchill.

Q. How old a man are you?

A. I am fifty-five.

Q. Whereabouts do you live?

A. I live at Crandall.

Q. How long have you lived there?

A. Oh, I guess about thirty-five years.

Q. Are you a married man?

A. Yes, sir.

Q. And what kind of work do you do generally?

A. Well, practically, work on the farm.

Q. On the farm?

A. Yes, sir.

[fol. 114] Q. Were you ever employed out here on the T & P lines between Dallas and Fort Worth?

A. Yes, sir.

Q. Were you working out there with Mr. Tom Baker and his two sons?

A. Yes, sir.

Q. And Mr. Claude Baker at the time of Claude Baker's death?

A. Yes, sir.

Q. Pavan, do you remember now about how long you had been working out there?

A. Oh—

Q. At the time Mr. Baker was killed?

A. Up until now?

Q. No, sir. About how long had you been working out there when Mr. Baker got killed?

A. Oh, I guess about eight months. Seven or eight months.

Q. All right. What was your job, Pavan?

A. I was behind the machine putting sand in the bucket.

Q. Putting sand in the bucket?

A. In the bucket. Yes, sir.

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[fol. 115] Cross examination.

By Mr. Case:

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Re-direct examination.

By Mr. Baker:

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(Witness excused.)

[fol. 116] H. Luther Freeman, the next witness called by the Plaintiff, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Hill:

Q. What is your name?

A. Luther Freeman.

Q. Luther, speak up good and loud, will you?

A. Yes, sir.

Q. So that the last man on the jury can hear you over there.

A. Yes, sir.

Q. Freeman, Luther, where do you live?

A. I live at Crandall, Texas.

Q. And how long have you lived down at Crandall?

A. I have lived at Crandall about five years now.

Q. Luther, did you know Claude Baker before he was killed?

A. Yes, sir.
Q. About how long had you known him?
A. I had knowed him, oh, nine or ten months.
Q. And did you ever work with him out here on the T & P Right of way between Dallas and Grand Prairie?
A. Yes, sir.
[fol. 117] Q. And were you out there the day that Mr. Baker was killed?
A. I was.

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Cross examination.

By Mr. Case:

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Re-direct examination.

By Mr. Hill:

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Re-cross examination.

By Mr. Case:

* * * * * * *

Q. By the way, who were you working for on that job?
A. I was working for Mr. Nichols.
Q. Mr. Nichols, W. H. Nichols & Company?
A. I think so; yes, sir.
Q. He is the man that paid you your salary, wasn't he?
A. Yes, sir.
Q. And who was your boss on that job?
A. I can't call the man's name.
Q. Mr. Joe Roskydoll?
A. Mr. Joe Roskydoll; yes, sir.
Q. He is the man that gave you your orders, wasn't he?
A. Yes, sir.
[fol. 118] Q. You figured he was your boss?
A. Yes, sir.

Q. You didn't figure you were working for the T & P Railroad, did you?

Mr. Baker: Same objection, if the Court please.
The Court: I overrule the objection.
Mr. Baker: Note our exception.

Q. You didn't figure you were working for the T & P Railroad, did you, Luther?
A. I didn't know whether I was or not. I might—might have been working for both. It was all I knew, I just—I was on the T & P Railroad work.
Q. Well, the T P didn't hire you, did they?
A. Well, they didn't hire me.
Q. And the man that was paying you was Nichols, wasn't it?
A. Yes, sir.
Q. And you didn't go there to T & P to quit when you left out there, did you?
A. No, sir. I did not.
Q. You told Mr. Joe Roskydoll, didn't you?
A. Yes, sir.

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Re-direct examination.

By Mr. Hill:

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[fol. 119] Re-cross examination.

By Mr. Case:

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(Witness excused.)

(Reporter's Note: Motions of Plaintiff in re testimony of Plaintiff, Dovie Ray Baker, dictated into record at this point outside the presence of the Jury, appear in Bill of Exception herein.)

[fol. 120] JOHN JACKSON, the next witness called by the Plaintiff, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Hill:

Q. Mr. Jackson, what is your full name?
A. John E. Jackson.
Q. Where do you live?
A. Crandall, Texas.
Q. Speak up, so the last juror can hear you over here.
A. Crandall, Texas.
Q. All right. And how long have you lived there at Crandall?
A. Twenty years.
Q. Mr. Jackson, did you ever work out here on the T P Right of way between Dallas and Grand Prairie?
A. Yes, sir.
Q. Were you working out there with Mr. Claude Baker when he was killed?
A. Yes, sir.
Q. Mr. Jackson, I will ask you, sir, what was your job?
A. I was cement man—sand man. Put the sand in the hopper behind the grouting machine.
[fol. 121] Q. You put the sand in the hopper?
A. Yes, sir.

* * * * * * *

Q. Now, do you recall Mr. Slaton?
A. Yes, sir.
Q. Who was he?
A. He was the inspector.
Q. For who?
A. For the Railroad.
Q. Was he out there most of the time?
A. Yes, sir.
Q. Now, do you recall, Mr. Jackson, whether you all got that mixture that you pumped out through those pipes and out through the rubber hose, if you ever got it too thick or too thin?

A. Occasionally a little too thin.
Q. A little too thin?
A. Yes, sir.
Q. Now, did Mr. Slaton say anything if you did get it too thin?
A. Yes, sir.
Q. And what would he say to you?
A. He would tell us to put in more cement or—
Q. Make it thicker?
A. Little bit.

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[fol. 162] WILLIAM J. SAVAGE, by *oral deposition* taken by the Plaintiffs, presented by the Plaintiffs, as follows:

(Direct examination on deposition by Mr. Baker:)

"Q. Will you state your name, please?
A. William J. Savage.
Q. Where do you live?
A. Dallas, Texas.
Q. What is your business?
A. I am assistant chief engineer for the Texas & Pacific Railway Company.
Q. How long have you been employed by the Texas & Pacific Railway?
[fol. 163] A. Six years.
Q. Have you been employed by that company all of that time?
A. Yes sir.
Q. Prior to that who did you work for?
A. I worked for the Missouri Pacific Railroad.
Q. In what capacity did you work for them?
A. My last job with them was as assistant engineer.
Q. Have you ever worked for any other railroad companies?
A. I worked several years for the Katy Railroad.
Q. In what capacity did you work for them?
A. Draftsman, in the bridge department.
Q. Then have you spent almost all of your time since you were in school with some railroad company?
A. Yes.

Q. In the engineering department?

A. Yes.

Q. As assistant chief engineer, what are your duties?

A. Principally, my duties are the maintenance of roadway and track.

Q. Will you tell us a little more about that, just what your duties consist of?

A. Through my office appropriations are made to various divisions of the railroad for the upkeep of track and structures, and to such extent that it is necessary to control [fol. 164] expenditures I have a degree of supervision over those division employees of the railroad.

Q. Does that supervision extend to the maintenance of the road bed?

A. It does.

Q. And track?

A. Yes.

Q. Does that include the ties, the rails, bolts, so forth and so on?

A. Yes.

Q. Generally speaking are the section men under your supervision?

A. Yes, to the extent that through my office there is provided the necessary appropriations for their work.

Q. Likewise do you have charge of the maintenance of the track insofar as seeing that the work is done properly, and that certain work is carried out?

A. Yes, sir.

Q. Then generally speaking is the section foreman directly under your supervision, for that particular division, would you say that is correct?

A. Yes.

Q. That is correct is it?

A. Yes.

Q. Would you say that the over-all supervision insofar [fol. 165] as the manner and method in which the work will be done falls within the duties generally of the engineering department of the railroad?

A. Yes.

Q. In that connection do you have general charge of the maintenance of way?

A. Yes.

Q. Generally in the maintenance of road bed and track what is necessary to be done?

A. That is principally a matter of keeping the track in safe condition, and in good riding condition.

Q. When you say keeping it in a safe condition, what does that imply?

A. Principally to see that the rails are adequate, and that the track is not allowed to reach condition that it would be dangerous, and not to allow it to deteriorate to the extent that it would not hold the rails in proper gauge.

Q. Does that also include the inspection and replacement of angle iron, bolts, so forth and so on?

A. That's right.

Q. Now when you say a good riding condition, or a safe riding condition, what do you mean by that?

A. Well, I would say that a safe riding condition is one that would be what is called a smooth ride.

Q. A smooth ride?

[fol. 166] A. Yes.

Q. That is, having the track maintained so that it will produce a smooth ride?

A. Yes; of course we are interested in the type of ride the passengers on the train get, and we would not like to have the track in such condition that it would not be level enough to produce good riding qualities.

Q. Would low spots in the road bed be one thing that would bring that about?

A. Yes, low spots would be objectionable.

Q. Is the elimination of the low spots a necessary part of the maintenance of way?

A. That's right.

Q. Are the low spots likewise unsafe, to a degree that they would make the operation of a high speed train unsafe, if operated over a track having low spots?

A. Yes, if they become bad enough, they will interfere with the operation of high speed trains."

Mr. Baker: That stops at page 6, line 22. And starting at page 9, line 2—

"Q. Does the T & P own any stock in the W. H. Nichols Company?

A. I can't say.

Q. You don't know about that?

A. That is something that I don't know about.

[fol. 167] Q. Is that the name of the company, W. H. Nichols Company, or W. H. Nichols & Company?

A. W. H. Nichols & Company, I think it is."

Mr. Baker: Ending now at page 9, line 9, and beginning page 10, line 1.

"Q. What was the first contract that you had with them after you came to work for the T & P, that is, the first contract between the T & P and W. H. Nichols & Company, after you went with the T & P?

A. I can't say, I don't remember that.

Q. What did it cover, do you recall that?

A. No sir, I don't.

Q. Was that a contract for grouting some road bed, or what was it?

A. It was probably for some grouting, but I am not sure about that.

Q. You don't recall whether it was for grouting or post driving?

A. No, I don't.

Q. Just what is post driving?

A. That is the process of driving posts, setting posts vertically into an embankment along the end of the ties on the track itself; that is done where it is soft, and that stabilizes the road bed, it gives a stabilization to the road bed in those places where there is trouble because of soft-

[fol. 168] ness in the road bed.

Q. Is that a type of work that can be done by the regular employees of the Texas & Pacific Railway Company?

A. It has never been done so far as I know by the employees of the Texas & Pacific Railway Company; whether it could be done by them or not I do not know.

Q. But so far as you know it has never been done by them, at least not since you have been with the company?

A. That's right.

Q. Do they always have that work done by some contractor, on a contract basis?

A. Yes, so far as I know that is the way it has been done.

Q. Does that require any particular skill?

A. I wouldn't say that it requires any special skill; it does require special equipment that W. H. Nichols & Company use for that type of work.

Q. What kind of equipment is that?

A. That is a driver for the posts, and they probably have some other special equipment.

Q. Do they drive the posts while they are lying flat, or how do they do that?

A. No, they are stood up.

Q. They are stood up to drive them?

A. Yes.

Q. Are they driven between the ties?

[fol. 169] A. No, they are driven on the outside of the ties themselves, along the end of the ties.

Q. How does that help stabilize the track?

A. The posts stabilize the embankment in between the two rows of posts; a row of posts is put on either side of the track, and it stabilizes the track.

Q. Are the posts placed against each other?

A. No, the posts are not placed against each other they vary in distance, usually about eighteen inches apart.

Q. And that helps hold the road bed in position, the rails and the ties and such as that?

A. Yes.

Q. And help avoid the soft spots?

A. Well, I don't know that it helps avoid the soft spots, but it helps stabilize the track, by stabilizing the embankment.

Q. All right.

A. That is the purpose of that.

Q. Is there any other company that you know of that devotes its work to that type of railroad maintenance?

A. No, I don't believe there is another one that I can recall right now.

Q. Just what is meant by this process of grouting; just what do they do?

A. Grouting is putting sand into the embankment; it is [fol. 170] a method of putting sand into the embankment to fill the voids and force out the water from the water pockets that form in the road bed, or the road bed embankment.

Q. Does that require any particular skill?

A. That is debatable.

Q. What is your opinion about it as an engineer?

A. That depends on the standpoint from which anyone looks at the question; actually, looking at it from the manner in which the work is done, it has to be done according to a pattern, and I would say that there is some skill required to arrive at the best pattern for treating a particular condition.

Q. Did you furnish W. H. Nichols & Company with any specifications as to what you wanted done?

A. Only to the extent of telling them the location of the area to be grouted, the area to be covered."

Mr. Baker: Ending on page 13 with line 12; beginning again page 13, line 18.

Mr. Case: To get it in an orderly fashion, may I offer the next question after that?

The Court: All right.

(Offered by Defendant):

"Q. Did you submit any specifications or plans to them with relation to the proposed work?

A. No, no, there was no particular planning to that, on [fol. 171] the details of what was to be done; they went out and looked over the area to be worked on, they had a general idea of what was to be done."

Mr. Hill: The Plaintiff offers this, now.

(Offered by Plaintiff):

"Q. Could that grouting have been done by the Texas & Pacific Railway Company?

A. Not unless they had the special equipment that is necessary to do the work; if they had the proper equipment I would say that they could do it.

Q. What kind of equipment is used in grouting?

A. Well, they use, that is, the Nichols Company uses what is called a mud jack.

Q. What is a mud jack?

A. A mud jack is a hydraulic pump which forces under hydraulic pressure the material into the embankment, into the ground.

Q. Is that the same kind of equipment they use out on the highway?

A. Yes, it is similar to it at least.

Q. Those machines are in common use in construction work are they not?

A. Yes, I think that's right.

Q. They are available for purchase by the T & P Railroad aren't they?

[fol. 172] A. I suppose they are.

Q. In this mud jack, what kind of ingredients are used, do they use sand, cement or what?

A. They can use various materials, sand or cement, various materials are available for use in them.

Q. Are those materials available to the Texas & Pacific Railroad?

A. Yes, the railroad furnished the sand and cement for this grouting work.

Q. The T & P did furnish the sand and cement for this particular operation?

A. That's right."

Mr. Baker: We now offer page 16, lines three through five.

"Q. Did you specify any number of perforations that they were to make?

A. No sir."

Mr. Case: Now, may I offer the rest of the questions and answers?

The Court: All right.

(Offered by Defendant):

"Q. Was that left entirely to W. H. Nichols & Company, to determine that?

A. It was.

Q. How did they determine the cost, or the number of

[fol. 173] perforations to be made, or that would be required?

A. That I can't say."

Mr. Baker: Page 18, lines 10 through 13.

(Offered by Plaintiff):

"Q. Who was it that determined the area of the track that was to be grouted?

A. That would be determined generally by the roadmaster, after making an inspection of it."

Mr. Baker: Page 19, line 23 through page 20, line 2.

"Q. But it was left up to the roadmaster to select the areas of road bed that the grouting was to be done on, is that right?

A. That's right; so far as I know there was no limitation on the perforations to be made."

Mr. Case: Now, may I pick up at this question there at line 15, page 19?

Mr. Baker: Yes.

(Offered by Defendant):

"Q. But the decision as to where they would put the grouting, the perforations and such as that, where they would drill the holes and so on and where they would use the mud pump, that was determined by the W. H. Nichols Company?

A. Yes.

Q. The points at which they would make the perforations [fol. 174] was left up to them?

A. That's right."

(Conference at bench.)

Recess

Mr. Baker: Page 22, line 10.

(Offered by Plaintiff):

"Q. And the sand was to be furnished by the railroad company?

A. It was.

Q. Was the water also to be furnished by the railroad company?

A. It was; no, I guess the water was to be furnished by W. H. Nichols & Company.

Q. It was?

A. Yes.

Q. And the cement was to be furnished by the railroad company?

A. It was.

Q. Was there anything else that was to be furnished by the railroad company?

A. No, I believe that is all; I believe according to the terms of the contract that we were to furnish some transportation for them, in connection with some of the equipment to be sent to the job."

Mr. Baker: End page 23, line 2. Begin page 24, line 18.

[fol. 175] "Q. Is grouting work simply part of the regular maintenance of the track?

A. Yes, I would say that it is; it is not regular maintenance work, but it is a special type of maintenance.

Q. It is a part of the maintenance work that needs to be done from time to time for the preserving of the road bed in good condition, is that correct?

A. I would not say that it has to be done, but it is one way of doing it; it is not required, but it is one way of doing it."

Mr. Baker: End page 25, line 2. Beginning page 27, line 2.

"Q. Other than that, did the roadmaster have anyone else on the ground from time to time?

A. Yes, there was an inspector on the job.

Q. I am talking about this particular job now; was there anyone else on that job, any inspector?

A. Yes.

Q. What was his name?

A. His name was Robert Slaton.

Q. Was he present at the time of the accident in which Mr. Baker was killed?

A. I don't recall whether he was present at that time or not.

[fol. 176] Q. What were Mr. Slaton's duties?

A. Mr. Slaton's duties principally were to look after the railroad operation, and make inspections to determine whether or not the road was dangerous to railroad operation.

Q. Did he also look after the work being done by W. H. Nichols & Company?

A. Yes.

Q. To see that it did not become dangerous to the railroad in the operation of the trains?

A. Yes, to see that the work being done did not cause any trouble in the operation of the trains.

Q. Did he have the right and authority to, in the event he thought that W. H. Nichols & Company did something that would interfere with the operation of the trains, to have it stopped?

A. He did.

Q. Did he have anything to do with the actual performance of the work?

A. No, he did not.

Q. Did he have any duties in connection with the actual selection of locations of the work?

A. No, the roadmaster was the one that would have the right to see about that. To see that the work was being done in accordance with the contract; that was principally the thing that he, Mr. Slaton, would have to do with it. The [fol. 177] matter of making the contracts and so on were handled through the office.

Q. But the roadmaster did have something to do with seeing whether the work was done according to the contract or not?

A. That's right.

Q. In other words, you had to have someone to see that the work was done right?

A. Yes.

Q. And the roadmaster would go over the work and see whether it measured up to what he expected, and whether it met his ideas about the matter?

A. As far as seeing that the work conformed to the contract, the area to be worked on or not.

Q. Let me ask you this question: he had the right did he not, if W. H. Nichols & Company did something that didn't suit him, to require them to perform the work in such manner that it did suit him, didn't he?

A. To some degree I would say that is right; his job was principally to see that the work did not interfere with the operation of the trains.

Q. Suppose that W. H. Nichols & Company did not make enough perforations and he felt like they should make more perforations than they were making, would he have the right to require them to do that?

A. I should think that he would have that right, but I [fol. 178] am not sure about that.

Q. Would you say that he had that right?

A. I believe he would have that right, but he would have called it to my attention first.

Q. But you do feel that he would have had that right?

A. I feel that he would have had that right.

Q. Likewise if in your opinion they were not pumping the right amount of sand into the perforations, would he have had the right to require them to put more sand into the holes, or what about that?

A. I think we would have had that right, if we had felt that enough sand was not being pumped into the perforations, if it became apparent that they were not doing that part of it according to the contract, in our judgment, I feel that we would have had that right."

Mr. Baker: End page 30, line 3. Begin page 30, line 24.
Mr. Case: Well, let me go pick up that.

(Offered by Defendant):

"Q. All right.

A. But as a general rule that was left to the judgment of W. H. Nichols & Company, whenever that was to be done; so far as I know, that didn't come up during the contract."

Mr. Baker: Page 30, line 24.

(Offered by Plaintiff):

[fol. 179] "Q. But if they had gone ahead and finished the work and it did not come up to your expectations, you

do feel that you would have had the right to tell them that it was not done right, and that something else was needed, is that right?

A. I think we would have the right to tell them to go back over it and re-grout the area.

Q. In other words after they had gone over it if the work did not come up to your expectations, you felt that you had the right to tell them to go back over it again; that is right is it not?

A. That's right.

Q. You did feel that you had the right under the contract you had with them, to tell them to do the work over if it did not suit you, didn't you?

A. Yes.

Q. The contract did not call for any limitation as to the length of time that they had in which to do the work, did it?

A. I don't believe it did.

Q. The contract told them the area in which the work was to be done?

A. That's right.

Q. Under the contract of December 2, 1952, you had the right to terminate the contract if you desired to do so, is that correct?

[fol. 179a] A. I am not sure about that.

Q. You had the right under the contract at any time to terminate the contract, didn't you?

A. I am not familiar with the wording of the contract in that respect; I don't know whether that is right or not, I do not recall the wording of the contract on that.

Q. Let me ask you this question: after you had been having the work done for say three months out there, between mile posts 215 and 230, if the roadmaster had decided that that was all of the work that needed to be done, you had the right to terminate the work then didn't you?

A. That is right.

Q. The amount of work to be done was left purely up to the railroad company, wasn't it?

A. The area to be covered was left up to the railroad company."

Mr. Baker: Ending page 32, line 14. Beginning page 40, line 22.

"Q. Was the slow order necessary for the protection of the workers in that area?

A. In places it was, I don't know whether it was in that particular area or not.

Q. Did the work being done require the men to be on the track itself?

A. During the time they were working, yes.

[fol. 179b] Q. Likewise did it require them to be very close to the track?

A. Yes.

Q. The cement mixer itself was fairly close to the track was it not?

A. Yes.

Q. Did you prescribe the distance at which W. H. Nichols & Company would place the mixer, from the track?

A. We prescribed the minimum distance from the track at which it should be placed, from the center of the track.

Q. You did prescribe the minimum distance from the center of the track?

A Yes.

Q. Do you recall what that distance was?

A. Eight feet and six inches as I recall.

Q. How far would that place the mixer from the end of the ties?

A. That would place the mixer about four and a half feet from the end of the ties."

Mr. Baker: And that is all of that deposition.

[fol. 180] Mr. Baker: We will call Mrs. Dovie Ray Baker.

Dovie Ray Baker, Plaintiff, having first been duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. State your full name, please?

A. Dovie Ray Baker.

Q. How old are you, ma'am?
A. Thirty-five.
Q. Are you the surviving wife of Claude Baker?
A. Yes, sir.
Q. How old was your husband at the time of his death?
A. Fifty-six.
Q. When were you and Mr. Baker married?
A. March 28th, 1940.
Q. And whereabouts were you married?
A. Crandall.
Q. Did you and Mr. Baker have any children?
A. Yes, sir.
Q. And how many children did you have?
A. Three.
[fol. 181] Q. What are their ages, please?
A. Now, the oldest one is fifteen.
Q. And what is her name?
A. Bobby Glen Baker.
Q. That is a boy.
A. Yes.
Q. And he is here in the courtroom?
A. Yes.
Q. And the next child?
A. The oldest girl is thirteen.
Q. What is her name?
A. Claudette.
Q. All right.
A. And the youngest one?
A. Oleta Fay, is ten.
Q. That is their ages at the present time?
A. Yes, sir.
Q. When you and Mr. Baker were married what kind of work was he doing?
A. Worked for W. H. Nichols and farming.
Q. Whereabouts were they working at that time on the railroad?
A. Well, I don't know, sir; somewhere up here on the other side of Dallas.
Q. And whereabouts were you living then?
[fol. 182] A. Crandall.
Q. You say he was farming also?
A. Yes, sir.

Q. Did he work during the day time on the railroad?
A. Yes, sir.
Q. And then when would he do his farm work?
A. In the afternoon and on Saturday, sometimes on Sunday.
Q. That is when you first got married?
A. Oh, no, sir; he didn't work on the railroad then.
Q. Well, what I wanted to get at first, when you all were first married what was he doing?
A. General farming.
Q. Where were you all living then?
A. Between Crandall and Forney.
Q. What kind of farming was he doing?
A. Raising cotton, oats and corn.
Q. Do you remember how many acres he had at that time?
A. No, sir; it was something over three hundred acres, though.
Q. That he farmed?
A. Yes, sir.
Q. Do you know whose place it was on?
A. Yes, sir.
Q. Whose place was it on?
A. It was the American Bank in Terrell's place.
[fol. 183] Q. How long did you all live on that farm?
A. We lived there until 1945.
Q. And did you help with the farm work?
A. Yes, sir.
Q. From that place where did you move?
A. We moved up on the Loan Company place close to Forney.
Q. How many acres did he have up there?
A. It was three hundred acres divided between three families; we had one hundred acres.
Q. How long did you stay on that place?
A. At that place, we stayed there about two years.
Q. And what did he raise there?
A. Cotton and corn.
Q. And that brought you up to sometime in 1948?
A. Yes, sir.
Q. You were there about three years?
A. Yes, sir.

Q. Where did you move then?

A. We moved on close to Forney about a mile from where we was then.

Q. On a farm?

A. Yes, sir.

Q. Whose place was that?

A. Miss Allie Davis'.

Q. How many acres did he have there?

[fol. 184] A. About seventy-five or a hundred acres.

Q. What did he raise there?

A. Cotton and corn.

Q. And then where did you move?

A. We moved on Dr. Martin's place right at Rhinehart.

Q. Dr. Martin's place?

A. Yes, sir.

Q. Where was that located?

A. Here in Dallas, Dallas County, around—out at Rhinehart.

Q. Out at Rhinehart?

A. Yes, sir.

Q. And what did he do for Dr. Martin?

A. Farmed and worked at a dairy.

Q. What?

A. Farmed and worked in a dairy.

Q. Did he farm Dr. Martin's place?

A. No, sir; we had cotton of our own.

Q. You had a crop of your own?

A. Yes, sir.

Q. About how many acres did you have that year?

A. Oh, I would say about thirty-five or forty acres.

Q. And then in addition to attending to his crops, he worked for Dr. Martin?

A. Yes, sir.

[fol. 185] Q. Was he on a salary?

A. Yes, sir.

Q. How much did he make working there for Dr. Martin?

A. $5.00 a day.

Q. How many days a week did he work?

A. Six days a week.

Q. Did you have anything furnished to you?

A. Yes, sir; we had our house and our milk and our lights.

Q. Did he make a crop that year on his own place, Mr. Baker?

A. Yes, sir.

Q. Do you remember now how much cotton he made that year?

A. No, sir; I don't.

Q. On that place, how long did you stay there?

A. We stayed there a year until the City took it over.

Q. Then where did you go?

A. We moved to where Mr. Baker was killed at.

Q. That is down near Crandall?

A. Crandall, yes, sir.

Q. And how many acres did he have down there?

A. Oh, about seventy-five acres, I believe.

Q. What did he raise down there?

A. Cotton and corn.

Q. In addition to the cotton and corn did he have a garden?

A. Yes, sir. He did.

[fol. 186] Q. Did he have a milk cow?

A. Yes, sir; we had two.

Q. Have any chickens?

A. Yes, sir.

Q. How about a garden?

A. We had a garden.

Q. Now, up until you moved down to this place at Crandall where you were living when he met his death, had he begun to work out and do public work?

A. Yes, sir.

Q. Do you remember about what year it was he first started doing work other than farm work?

A. In 1950, I believe.

Q. Was that along during some of the drouth years?

A. Yes, sir.

Q. And where did he first start working then other than on the farm?

A. Well, he had worked at a corporation gin at Forney.

Q. At Forney?

A. Yes, sir.

Q. And what time of the year would he work out there?

A. From the cotton season through January.

Q. Well, would that be in the fall then?
A. Yes, sir.
Q. Up until January?
[fol. 187] A. Yes, sir.
Q. What wages did he make out there?
A. $7.00 per day.
Q. And how many days a week did he work?
A. Sometimes seven days.
Q. And in addition to working there at the gin that year did you also farm?
A. Yes, sir.
Q. At one of the places you told us about?
A. Yes, sir.
Q. And did he work there at that gin more than once?
A. Yes, sir; several years.
Q. From 1950 on for several years?
A. Yes, sir.
Q. And during those several years would he also raise a crop?
A. Yes, sir; he did.
Q. Then other than working at the gin did he work for anybody else?
A. Yes, sir. W. H. Nichols.
Q. When did he first go to work for them?
A. I believe it was in—kind of in the winter of 1950.
Q. Do you know how long he worked that time?
A. Off and on up until his death.
Q. What wages did he get?
[fol. 188] A. About fifty dollars per week, I believe.
Q. Was that what he was making at the time he was killed?
A. Yes, sir.
Q. Do you recall, Mrs. Baker, about when it was that he went to work there the last time on the right of way?
A. It was either in March or April.
Q. Of 1952?
A. Yes, sir.
Q. And how long did he work there?
A. Up until his death.
Q. Did he work regular and steady?
A. Yes, sir.

Q. Making the same wage?
A. Yes, sir.
Q. I believe you have told us that he had a crop at the time he got killed?
A. Yes, sir; he did.
Q. And did you harvest the crop?
A. Yes, sir.
Q. After his death?
A. Yes, sir.
Q. How much cotton did you get?
A. We made six bales.
Q. How much did you get for the cotton?
A. Something over eight hundred dollars.
[fol. 189] Q. Did you have some grain?
A. No, sir; we had some hay; that's all.
Q. Some hay?
A. Yes, sir.
Q. Did you sell the hay?
A. Yes, sir.
Q. How much did you get for the hay?
A. Well, the land lady got half and we got half; I think our part come to above seventy-five dollars.
Q. And did you harvest anything else there?
A. No, sir.
Q. After his death?
A. No, sir.
Q. You continued to live down there at Crandall, then, for how long?
A. I lived there about two weeks?
Q. Where did you move then?
A. I moved with my mother.
Q. Where was that?
A. Down at Seagoville; close to Seagoville.
Q. And where are you living now?
A. At Riley.
Q. Riley, Texas?
A. Yes, sir.
Q. And do you work at the present time?
[fol. 190] A. Yes, sir; I do.
Q. Where do you work?
A. Conroe Manufacturing Company.

Q. How long have you been working there?
A. I have been there over a year this last time.
Q. Before you went to work for Conroe manufacturing company after Mr. Baker's death, did you do anything else?
A. Yes, sir; I took in ironing.
Q. Took in ironing?
A. Yes, sir.
Q. Did that at home?
A. Yes, sir; I did.
Q. Were you—where you could be with the children?
A. Yes, sir.
Q. Mrs. Baker, what was the state of your husband's health at the time of his death?
A. It was good as far as I knew.
Q. He seemed to be strong and healthy?
A. Yes, sir.
Q. During your married life do you recall of Mr. Baker ever having to have a doctor?
A. No, sir; I don't.
Q. Did you see him that morning?
A. Yes, sir.
Q. When he left to go to work?
[fol. 191] A. Yes, sir.
Q. About what time did you bid him good-bye?
A. About 6:00 o'clock in the morning.
Q. What kind of spirits was he in?
A. He seemed to be in good spirits when I left him.
Q. Did you notice anything at all wrong with him?
A. No, sir; I didn't.
Q. When did you next see him?
A. When they brought him home from the funeral home that night.
Q. Mrs. Baker, what kind of a husband was Claude Baker?
A. Well, he was a good husband.
Q. Did he ever mistreat you in any way?
A. No, sir; he did not.
Q. Was your married life a happy one?
A. Yes, sir; it sure was.
Q. Did he help you about the house doing anything?
A. Yes, sir; he did.

Q. What did he do?

A. Well, he—it is hard to describe all he did do, but he did a lot.

Q. Did he like to wash dishes?

A. No.

Q. All right. I wish you would tell us, please, what kind of father he was?

[fol. 192] A. Well, he was the best, I thought.

Q. What was his attitude—what was the attitude of the children toward Mr. Baker?

A. Well, they were fond of him.

Q. Did he seem to be fond of them?

A. Yes, sir; he did.

Q. Tell us something about what he would do with the children?

A. Well, he would take the boy hunting almost every time he went on Sunday afternoons; carried them to the show every Saturday night and carried them places—almost everywhere he went.

Q. Did he ever give them any instructions about what was right and what was wrong?

A. Yes.

Q. And what to do and what not to do?

A. Yes, sir. He did.

Mr. Baker: You may have the witness.

Cross examination.

By Mr. Case:

Q. Mrs. Baker, did you see the pay checks that Mr. Baker got?

A. No, sir. I did not see them. He cashed them.

Q. All right. You understood he was working for W. H. [fol. 193] Nichols and Company, didn't you?

A. Yes, sir; I understood that.

Q. That is who he told you he was working for?

A. Yes, sir; he did.

Q. He didn't tell you he was working for the T & P Railroad, did he?

A. No, sir; he did not.

Q. Now, Mrs. Baker, do you know about the papers your lawyer has filed for you in this case that you are claiming that he was an employee of the railroad?

A. Well, only what he told me.

Q. That is what Mr. Baker told you?

A. Yes, sir.

Q. Mr. Baker told you he was claiming that your husband was an employee of the railroad—is that correct?

A. I don't know, only what he has told me.

Q. Well, that is what I am asking you; is that what he told you?

A. Yes, sir.

Q. Now, Mrs. Baker—

Mr. Case: Mark these.

(Reporter's Note: At this point, two instruments, Notice of Fatal Injury, and Claim for Compensation for Death, Industrial Accident Board, Austin, Texas, were marked by [fol. 194] the reporter for Identification, respectively, as: Defendant's Exhibit No. 1, and Defendant's Exhibit No. 2, and same or copies of same will accompany this Transcript.)

Q. Mrs. Baker, I hand you an instrument that has been marked as Defendant's Exhibit No. 1, and at the top of it it says, "Notice of Fatal Injuries, Industrial Accident Board, Austin, Texas"; that is your signature on it, isn't it (hands to witness)?

A. Yes, sir; it is.

Q. And this is a paper that was prepared for you by Mr. Russell Baker over here, wasn't it?

A. Well, I am sure it is; my signature is on it.

Q. Well, I mean you went to see him about the compensation claim with the insurance carrier for Nichols, didn't you?

A. Yes, sir; I did.

Q. And you told him the facts, didn't you?

A. Yes, sir; I did.

Q. And then this notice of claim—here, of fatal injuries, it says, "Claude Baker sustained fatal injuries while employed by"—and Mr. Baker had typed in, "W. H. Nichols & Company, Incorporated", didn't he?

A. Yes, sir; he did.

[fol. 195] Mr. Case: All right, and then we will offer that instrument into evidence.

Mr. Baker: May I see it just a second?

Mr. Case: That is the Notice (hands to counsel).

Q. I also show you an instrument that has been marked Defendant's Exhibit No. 2, which at the top says, "Claim for compensation for death, Industrial Accident Board, Austin, Texas", and that is another paper that was prepared in Mr. Russell Baker's Office for you, wasn't it (hands to witness)?

A. Yes, sir; I am sure that it is.

Q. And that is your signature down there?

A. Yes, sir.

Q. And there again this says, "This is to notify you Employers Mutual Liability Insurance Company of Wisconsin that I claim compensation from you under the Employers Liability Act of Texas on account of the death of Claude Baker on the 20th day of August, 1952, which resulted from injuries sustained on the 20th day of August, 1952, while in the employ of Mr. W. H. Nichols & Company, Incorporated"—isn't that correct?

A. Yes, sir.

Q. Now, you—

OFFER IN EVIDENCE

Mr. Case: We offer that in evidence, your Honor, and you want to see this, Russell (hands to counsel).

Mr. Baker: Yes. (Counsel examines same.)

Mr. Case: (Hands instruments to Jury.)

[fol. 196] Q. At the time those instruments were signed by you and sent to the Industrial Accident Board of Texas at Austin, you were making a claim against the workmens compensation insurance carrier of W. H. Nichols on the death of Claude Baker based on your representation that Claude Baker was an employee of W. H. Nichols & Company, weren't you?

A. Yes, sir.

Q. And the matter went on and an Order was entered by the Industrial Accident Board—

Mr. Baker: Now, of course, we object now, if the Court please, to that for the reasons that he has heretofore indicated that in the record—

The Court: I think the record will reflect that.

Mr. Baker: May I have my full bill?

The Court: Yes; the record reflects already your exception on that.

(Conference at Bench)

(Question Repeated by Reporter)

A. Yes, sir.

Q. Now, then, even though your lawyer is now saying in this lawsuit that Claude Baker was an employee of the T & P Railroad, have you gone and said, "Here, Industrial Accident Board", said, on, "Here, Employers Mutual Liability Insurance Company of Wisconsin, I was wrong in making this claim for this compensation, and wrong in telling you that Claude Baker worked for Nichols & Company"—have you done that?

A. No, sir; I have not.

Q. All right. You have done nothing to change that?

[fol. 197] A. No, sir.

Q. All right. By the way, have you remarried since—

A. No, sir; I haven't.

Mr. Case: That is all. Thank you.

Re-direct examination.

By Mr. Baker:

Q. Mrs. Baker, what was the amount of the funeral bill that you incurred on account of Mr. Baker's death?

A. Five hundred and forty-five dollars.

Q. Now, did you know me up until the time you employed our firm?

A. No, sir; I did not.

Q. You are not a lawyer?

A. No, sir; not hardly.

Q. Ever study any law?

A. No, sir.

Q. And you never were out there on the job, were you?
A. No, sir; I wasn't.
Q. And you don't know who gave the instructions and who didn't?
A. No, sir; I do not.
Q. And you have never seen the contract between the Nichols & Company and the Texas & Pacific Railway Company, have you?
A. No, sir.
[fol. 198] Q. And you have left all of the matters in connection with that up to your lawyers, haven't you?
A. I certainly have.
Q. That is what you hired us for, wasn't it?
A. Yes; it was.
Q. Were you and Mr. Baker ever separated?
A. No, sir; we wasn't.

Mr. Baker: That's all.

Re-cross examination.

By Mr. Case:

Q. Mrs. Baker, I understand you are not familiar with the law, but you did know who your husband told you he was working for, didn't you?
A. Yes, sir.
Q. And that was W. H. Nichols & Company, wasn't it?
A. Yes, sir.

Mr. Case: That's all.

Re-direct examination.

By Mr. Baker:

Q. Your husband wasn't a lawyer, either?
A. No, sir.
Q. Never studied law?
A. No, sir.

[fol. 199] Mr. Baker: That's all.

The Court: All right.

(Witness excused.)

The Court: All right; who will you have next?

(Conference at Bench)

Mr. Baker: If the Court please, we now offer in evidence the Motion for Leave to file a Cross Action against a third party filed by Robertson, Jackson, Payne, Lancaster and Walker on behalf of the T & P Railroad Company on May 4th, 1953.

Mr. Case: Let me see; I don't think that is a proper matter; that particular part has been disposed of on the other trial.

(Conference at Bench)

The Jury Out

(Conference at Bench)

The Court: I think my ruling is going to be this; unless it can be shown that something has occurred to put those witnesses on notice of this contract that it will not be admissible.

(Conference at Bench)

Mr. Baker: Well, we want to make our Bill and offer it.

[fol. 200] (Conference Between Counsel for Plaintiff)

Russell M. Baker, attorney for the Plaintiff, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Hill:

Q. Your name is Russell Baker?

A. It is.

Q. And I will ask you, Mr. Baker, if you are one of the attorneys in this case?

A. One of the attorneys of record for the Plaintiffs.

Q. In this case?

A. Yes, sir.

Q. Now, Mr. Baker, I will ask you, sir, if you prepared the pleadings on file in this case?

A. I prepared the original pleadings and I have prepared all of the subsequent pleadings.

Q. All right, sir. I will ask you, sir, if the original petition was filed after the Defendant in the case, Texas and Pacific Railway Company, prepared and filed its cross action against the W. H. Nichols & Company?

[fol. 201] A. They prepared a Motion for Leave to file a third party action against W. H. Nichols & Company, which leave was granted by the Court after a hearing.

Q. You want to introduce this?

A. That cross action of the Texas & Pacific Railway Company against W. H. Nichols and Company was filed on May 3rd, 1954.

Q. All right. We will offer it in evidence.

A. We offer it in evidence.

(Reporter's Note: The above described pleading in this cause was marked by the reporter for Identification as Plaintiff's Exhibit A, and same will be found among the papers in this said cause.)

Q. I will ask you, Mr. Baker, if you received either the original of this or a copy of this?

A. I received a copy of it.

Q. Of Plaintiff's Exhibit A?

A. I received a copy of that.

Q. Now, attached to the copy of this Plaintiff's Exhibit A, I will ask you sir, if there was a contract?

A. There was a contract between W. H. Nichols & Company and the Texas and Pacific Railway Company.

[fol. 202] Q. All right, sir. Now, subsequent to receiving those pleadings and that contract, what course of action did you take with reference to further pleadings in this case?

A. That was the first time that I knew of anything about —a contract between W. H. Nichols & Company and the Texas & Pacific and as to its terms and provisions, although, a short time before that Mr. Donald Case had indicated to me that he might bring in or endeavor to bring in the W. H. Nichols & Company, but that was the first time that I saw the contract between Nichols and Company and the Texas and Pacific Railroad Company.

Q. Now, after reading that contract and studying that contract, did you make any special investigation with reference to whether or not the deceased, Claude Baker, was an employee of W. H. Nichols & Company or the Texas and Pacific Railway Company?

A. After I read that contract, I decided that there was a serious question as to whether or not W. H. Nichols & Company was in fact an independent contractor, and concluded that Claude Baker at the time of his death very likely was entitled to come under the terms and provisions of the Federal Employers Liability Act, and supplementing that, at a later date I made additional investigations which convinced me that the Texas and Pacific Railway Company had a right to control the details of the work, which justified an action against the Texas and Pacific Railway based upon the fact that W. H. Nichols and Company were not independent contractors and that Claude Baker was subject to Federal Employers Liability Act.

[fol. 203] Q. Now, I will ask you, Mr. Baker, if on October 22nd, 1953, you filed Plaintiff's Second Amended Original Petition in this cause alleging therein the substance of the pleading, in substance that Claude Baker at the time of his death was an employee of the Texas & Pacific Railway Company, and he was or his beneficiaries, therefore, were entitled to benefits under the Federal Employers Liability Act?

A. I did.

Mr. Hill: We will offer this in evidence.

(Reporter's Note: At this point, Plaintiff's Second Amended Original Petition in this said cause, was marked for Identification by the Reporter as Plaintiff's Exhibit B, and same will be found among the papers in this cause.)

(Conference at Bench)

Q. I will ask you, Mr. Baker, if since the time that you formed the opinion that Claude Baker was working as an employee of the Texas & Pacific Railway Company, you changed your position or contentions in this lawsuit?

A. I changed it to this extent, that I filed amended pleadings based on two counts; first, that Claude Baker was an [fol. 204] employee of the Texas & Pacific Railway and was within the meaning of the terms and provisions of the Federal Employers Liability Act; and, second, to continuing my count in the original petition, that is, a suit for damages, common law, based on common law negligence against the Texas & Pacific Railway Company.

Q. Now, I will ask you, Mr. Baker, if in May, 1955, this cause went to trial for the first time?

A. It did.

Q. And at the conclusion of the evidence on that trial, sir, if the Court sustained a motion for instructed verdict on behalf of the W. H. Nichols Company?

A. It did.

Q. And I will ask you what kind of order was entered?

A. It was an interlocutory order.

Q. Has it been prepared?

A. I guess it has. At least, it is not a final judgment.

Q. All right.

(Conference Between Counsel for Plaintiff)

Q. I will ask you, also, Mr. Baker—state whether or not any employees of the W. H. Nichols & Company testified on the first trial of this cause in May of 1955?

A. They did, on behalf of the Texas & Pacific Railway Company.

Mr. Hill: I guess that is all.

Mr. Baker: That is all. You want to ask me some ques- [fol. 205] tions?

Mr. Case: Yes.

(Conference Between Counsel)

Cross examination.

By Mr. Case:

Q. Mr. Baker, I hand you an order which bears a date, August 25th, 1955, and signed by Judge James K. Evetts, Judge of the 27th Judicial District Court, sitting for the Judge of the 95th District Court, Dallas County, Texas, and

ask you if that is an interlocutory order that was entered (hands to witness) following the granting of your Motion for new trial in this case?

A. No, sir. Oh, yes; it is. I am sorry.

Q. And by the terms of that interlocutory order, the court has ordered that the Cross Plaintiff, the Texas & Pacific Railway Company, take nothing against the Cross Defendant, W. H. Nichols & Company—isn't that correct?

A. That is correct.

Q. And no issue has been litigated in this trial of this cause with respect to any right of indemnity that the T & P may have against the W. H. Nichols & Company—isn't that correct?

A. In the present trial, but this is not a final judgement.

Q. I am asking about the present trial?

A. Yes, sir.

[fol. 206] Q. That is correct, isn't it?

A. Yes; that is correct.

Mr. Case: That is all.

Mr. Hill: That interlocutory order—

A. As I understand it is.

Mr. Hill: Is a final judgement?

A. It is not from our standpoint—

(Conference at Bench)

(Reporter's Note: At this point, the abovedescribed Order of Judge James K. Evetts, was marked for Identification by the Reporter, as Plaintiff's Exhibit C, and same will be found among the papers in this said cause.

(Conference at Bench)

RECESS

(Out of Hearing of Jury, cont'd:)

Mr. Baker: It is agreed by and between the counsel for the Plaintiff and Defendant, in open Court, that Claude Baker met his death as a result of injuries which he re-

ceived on August 20th, 1952, when he was struck by the Defendant's train. Is that all right?

Mr. Case: That's right? Yes.

[fol. 207] Mr. Baker: Then it is the Court's ruling that in offering this contract to the jury and reading it I can not read that with reference to indemnity?

The Court: I think that will be my ruling; I don't see that it has any bearing on it.

(Conference at Bench)

The Court: That will be my ruling.

Mr. Baker: Note our exception.

(Conference at Bench)

Mr. Baker: It is further stipulated by and between the counsel for plaintiff and defendant, that if Employers Mutual Liability Insurance Company of Wisconsin, the workmens compensation carrier for W. H. Nichols & Company, Incorporated, at the time of the death of Claude Baker, as the right of subrogation in this case against the Defendant, Texas & Pacific Railway Company; that the amount to which they are entitled is seven thousand nine hundred and nineteen dollars and ninety-four cents?

Mr. Case: Yes.

Mr. Baker: But the parties do not stipulate that the said Employers Liability Mutual Insurance Company of Wisconsin is entitled to subrogation in the event it be found that Claude Baker, deceased, was covered by the terms and provisions of the Federal Employers Liability Act.

[fol. 208] Mr. Case: That is my contention, and I will stipulate that, but for the purposes of the record, I want it to be made clear that I am not trying to stipulate or waive the contentions of the parties who are not here and now being represented; I don't know what stipulations were made in the last trial between you and Employers Mutual and I am not trying to do anything to disturb that.

Mr. Baker: Neither am I.

(Conference at Bench)

Mr. Baker: It is further stipulated by and between counsel for plaintiff and defendant in open court that Dovie Ray Baker is the duly appointed, qualified administratrix of the estate of Claude Baker, deceased, having been duly appointed by the Probate Court of Dallas County, Texas, on the ..... day of .....

Mr. Case: You will supply that?

Mr. Baker: I will get that. Yes. Other stipulation, it is further stipulated by and between the counsel for the plaintiff and defendant in open court that at the time of the death of Claude Baker the said Texas & Pacific Railway Company was engaged in intra-state commerce, as well as inter-state commerce; that their railroad lines extended through parts of Arkansas, Louisiana and Texas; that the double tracks between Dallas and Fort Worth at the point where Claude Baker met his death, were used by trains engaged in intra-state commerce, as well as inter-state com-
[fol. 209] merce.

(Conference at Bench)

Mr. Baker: I guess that is about it, then; I want to have the opportunity to introduce that—I want to offer the contract, with that exception, and I want to take the stand.

RECESS

THE JURY IN

RUSSELL M. BAKER, one of the attorneys for the Plaintiff, having resumed the stand as a witness, testified further as follows, to wit, in the hearing of the Jury:

Direct examination.

By Mr. Hill:

Q. Your name, please, sir?
A. Russell Baker.

Q. Mr. Baker, do you represent the Plaintiffs in this case?

A. I do.

Q. Now, I will ask you, Mr. Baker, if you filed the Plaintiff's Petition in this cause, original Petition?

A. I did.

Q. All right, sir. Now, I will ask you, Mr. Baker, sub-
[fol. 210] sequent to the time this Petition was filed, if you received a copy of a contract executed by the Texas and Pacific Railway Company and W. H. Nichols & Company?

A. I did.

Q. And how did you receive that?

A. That was in connection with a pleading filed by the Defendant, Texas & Pacific Railway Company, that came to my attention on or about May 4th, 1953.

Q. May 4th, 1953?

A. Yes.

Q. Now, was your Petition filed before that?

A. The original Petition was filed before that, yes.

Q. Now, after receiving a copy of the contract between the Railroad and W. H. Nichols & Company, I will ask you, sir, if you made any additional investigation with reference to whether or not Claude Baker at the time he met his death was employed by W. H. Nichols & Company or the Texas & Pacific Railway Company?

Mr. Case: If the Court please, I object to any answer to that question insofar as it embodies an opinion on the part of Mr. Baker as to his employment.

The Court: Yes; I will let him answer to that insofar as the investigation, and no further than that.

A. Well, first—

The Court: But do not state any opinions you have in regard to it.

[fol. 211] A. All right, Judge; I will try not to. Let me state first, that the contract came to me with a copy of the pleadings that I referred to, and that is how the contract came to my attention. Following that, I have read the contract and came to certain conclusions and made addi-

tional investigations both as to law and as to facts in this case.

Q. Now, after you made the investigation, Mr. Baker, did you file subsequent pleadings in this case?

A. Yes, sir. Based upon my investigation of the law, the study of the contract, and of the facts, I then prepared an amended petition in which I set out that Claude Baker was an employee of the T & P Railroad Company, and that the purported contract between W. H. Nichols Company and T & P was in violation of the terms and provisions of the Federal Employers Liability Act.

Q. Now, I will ask you, sir—

Mr. Case: Now, if the Court please, we ask that the Court instruct the jury to disregard that last—

The Court: I sustain the objection to that last part; disregard it.

Mr. Baker: Note our exception.

The Court: All right.

Q. I will ask you, sir, if you know as a fact whether or not the Railroads in Interstate Commerce come under the provisions of the Federal Employers Liability Act?

[fol. 212] Mr. Case: If the Court please, that is immaterial and irrelevant, and calls for a conclusion on the part of this witness.

The Court: I sustain the objection.

Mr. Hill: Note our exception.

Mr. Baker: Note our exception.

Q. I will ask you, sir, if after you received this contract accompanying the pleadings—some of the pleadings of the railroad in this case, and filed your subsequent pleadings, which you testified about, you changed your position with reference to the Employment status of Claude Baker at the time of his death?

A. I have not changed my position, except as we have an alternative plea. Our first plea, of course, is that he was an employee of the T & P and if we are mistaken in that, then our cause of action is based upon the law against the T & P, and that has been my position consistently from the time this came to my attention.

Mr. Hill: That is all.

Cross examination.

By Mr. Case:

Q. Russell, didn't you tell me three or four years ago that you went to a meeting of the National Association of Compensation and Claimant's attorneys and some lawyer [fol. 213] there suggested why didn't you claim this man was an employee of the T & P?

A. I think maybe somebody else might have given me some idea about it back before the time you filed this, yes, sir.

Mr. Case: That is all.

The Court: All right. Anything further?

Mr. Baker: I think that is all, Judge, from me, at least.

(Witness excused)

Mr. Baker: Now, we want to offer in evidence—and I guess I had better read it—

The Court: All right.

The Court: Go ahead.

Mr. Baker: The contract between Texas & Pacific Railroad Company and W. H. Nichols & Company, contained in Plaintiff's A hereof. (Counsel reads from Contract)

Mr. Baker: The Plaintiff Rests.

(Plaintiff Rests)

* * * * * * *

[fol. 214] William Robert Dillisar, the first witness called by the Defendant, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Case:

Q. Mr. Dillisar, be sure and speak up where all of the members of the jury can hear you. What is your name?

[fol. 215] A. William Robert Dillisar.

Q. Where do you live?
A. Clotierville, Louisiana.
Q. All right. Who do you work for now?
A. T & P Railroad.
Q. How long have you been working for the T & P?
A. Eight months.
Q. Who did you work for before that?
A. W. H. Nichols and Company.
Q. All right. Where are you working for T & P now?
A. Melville, Louisiana.
Q. How long did you work for W. H. Nichols?
A. Five years.
Q. And were you working for W. H. Nichols and Company about August 20th, 1952, when Claude Baker was struck by a train out here, in West Dallas?
A. I was.
Q. What was your job at that time?
A. Truck driver.
Q. For whom?
A. W. H. Nichols and Company.
Q. Were you at or near the place the accident occurred?
A. Yes; in between the two machines.
Q. All right. Now, between the two machines, you mean the two grouting machines?
[fol. 216] A. Yes, sir.
Q. All right. Now, here is a picture which has been marked Plaintiff's Exhibit No. 3. Would you step over here, please?

(Witness leaves stand)

Q. And stand here at one side where you won't be in the jury's way. All right. Are these the two machines, or do they appear to be, that you are talking about?
A. Yes, sir; they are.
Q. All right, and it has been testified that this is the East machine (indicating) and this the West machine.
A. Right.
Q. About where were you about when the accident occurred?
A. Well, I was about middle way between the two machines.

Q. All right, fine. And were you on the North or South side of that dump?

A. I was on the South.

Q. Take the stand.

(Witness resumes stand)

Q. Now, what were you doing at that time?

A. I was going to Mr. Roskydoll's machine to borrow tools to repair on ours, the West machine.

Q. Your West machine was broken down?

A. Yes, sir.

[fol. 217] Q. All right. Were you walking up on the dump or down in the ditch?

A. I was walking up on the dump.

Q. All right. As you were walking along there did you or not notice a train coming from Dallas going toward Fort Worth?

A. You mean the Westbound train?

Q. Yes.

A. Yes, sir; I did.

Q. What called your attention to that train?

A. The—it blew its whistle.

Q. All right. And did you or not notice an Eastbound train?

A. Yes, sir; I did.

Q. Where was that train with reference to where you were when you first noticed it?

A. About half a mile away.

Q. And which direction—West or East of you?

A. West of me.

Q. What called your attention to that train?

A. It blew the whistle.

Q. Well, did it blow the whistle once or more than once?

A. It blew it once about within a half a mile and then when it—just before it got to me it blew it again.

[fol. 218] Q. Just before it got to you it blew again?

A. That's right.

Q. All right. When it blew the second time, was that—had it gotten past the West machine or not?

A. Yes, sir; I was in between the machines when it blew the last time.

Q. All right. I will ask you with reference to that Eastbound train whether you noticed whether or not the bell was ringing?

A. Yes, sir; it was.

Q. All right, and about where was the train when you noticed the bell ringing?

A. Well, it was ringing when it passed by me.

Q. All right. And I will ask you whether or not you noticed the—that particular train, the Eastbound train, as to whether or not the headlight was on?

A. Yes; it was.

Q. And when you first noticed the train coming from the West to the East, what, if anything did you do?

A. Just stepped off of the track to wait for it to get by.

Q. Well, as that train came by which way were you facing?

A. I was facing the train until it got by me and then I faced the other machine and looked—turned my head toward [fol. 219] the other machine.

Q. Which machine?

A. The East machine.

Q. The East machine?

A. Yes, sir.

Q. All right. Did you turn to continue to watch the train after it passed you?

A. Yes, sir; I did.

Q. And your work had been around trains a good bit?

A. Yes, sir.

Q. Were you able to judge from observing a train about how fast it was going?

A. I would say approximately between eighteen and twenty miles an hour.

Q. All right, and did it pick up speed after it passed you and before the accident happened, or not?

A. No, sir; it didn't.

Q. And your best judgment is that it was going from eighteen to twenty miles an hour?

A. Yes, sir.

Q. All right. Did you see the accident itself?

A. Yes, sir; I did.

Q. All right. Just tell us what you saw, please?

A. Well, Mr. Baker was standing—seemed like to me he was bending over a box at the machine and had a sack or [fol. 220] something in his hand and he turned to his left in front of the train and just—I wouldn't say how many steps he took, but it looked to me like approximately two, looked like to me where I was, about five hundred feet away.

Q. All right. Mr. Dillisar, I will ask you whether or not you had any custom with reference to taking pictures on jobs where you were working?

A. Yes, sir; I did. I was there early that morning and before work I took a couple of pictures.

Q. All right.

Mr. Case: Mark these.

(Reporter's Note: At this point, four photographs were marked by the Reporter for Identification as: Defendant's Exhibit 3, Defendant's Exhibit 4, Defendant's Exhibit 5, and Defendant's Exhibit 6, and same will accompany this record.)

Q. Mr. Dillisar, I show you four photographs which have been marked Plaintiff's Exhibits 3, 4, 5 and 6 (hands to witness).

A. Yes, sir.

Q. Defendant's Exhibits, and ask you to look at them and [fol. 221] tell the jury whether or not those are photographs that you took out there that morning?

A. Yes; they are.

Q. All right. Were those photographs taken before or after the accident?

A. That was before.

Q. About what time of the day were they taken?

A. Between 7:00 and 8:00.

Q. Do the photographs correctly show what you were taking a picture of?

A. Yes, sir; they do.

Q. All right.

Mr. Case; We offer the photographs in evidence.

Mr. Baker: No objection.

Mr. Case: That is Exhibits three through six.

Q. All right. Would you step down—

Mr. Baker: May I see them a minute, Don?

Mr. Case: Oh; excuse me. (Hands to counsel)

Mr. Baker: I have no objection; I would like to see them a minute.

Q. Would you step down here again, please, sir?

A. Yes, sir; I will. (Witness leaves stand)

Q. I show you pictures here that—this one that is marked Plaintiff's Exhibit 3 and we will hold them toward the jury. Do you know which machine that was, the East machine or West machine?

[fol. 222] A. That is the East machine.

Q. All right. Can you identify the people that you see in that picture?

A. Well, no, sir; I can't say I can. This is—kindly looks like Mr. Baker here; I can't say definitely it is.

Q. Mr. Claude Baker?

A. Yes, sir.

Q. All right. And does this show the clearance here between the end of the ties and the machines?

A. Yes, sir.

Q. What would you estimate that distance to be?

A. I would say about six feet.

Q. All right. Now, here is the picture that has been marked Defendant's Exhibit 4, and shows which machine there?

A. I would say the Eastbound machine.

Q. And who is in that picture?

A. This is Mr. Baker, Mr. Claude Baker, and Mr. Joe Roskydoll in there.

Q. All right. And which one of them is Mr. Baker?

A. Mr. Baker is the guy bending over and Mr. Roskydoll is the one holding on the front of the machine.

Q. All right. And now I hand you a picture that has been marked Defendant's Exhibit 5 and ask you if you will tell us which direction the camera was facing?

A. It is facing West on the East machine there.

[fol. 223] Q. The camera is facing West from the East machine?

A. Yes, sir; that's right.

Q. Who is that a picture of?

A. That shows Mr. Slaton.

Q. All right.

A. Now, here is Defendant's Exhibit No. 6, and which machine is that in this picture?

A. That is the Westbound machine.

Q. The machine down to the West?

A. Yes, and I—the one I was on, working on.

Q. All right. Take your seat back up there, please, sir.

A. (Witness resumes stand)

Q. Now, before—before you heard the Eastbound train whistling and as you were walking toward that East machine, did you notice whether or not men were working down around that East machine?

A. No; I wouldn't say definitely. I couldn't tell whether they were working or not. I didn't pay that much attention.

Q. All right. Were any of the men out on the track there anywhere?

A. I didn't see any.

Q. All right. And after you heard that Eastbound train whistle, did you hear anybody holler "hot rail"?

A. I did.

Q. All right; did you hear one or more than one person [fol. 224] holler "hot rail"?

A. Well, most of our crew did down on our machine; I can't recall whether they hollered up there or not. I can't remember about that.

Q. Well, the ones you heard were on the West machine?

A. Right.

Q. You don't recall whether you heard anyone on the East machine holler it or not?

A. No, sir; I didn't.

[fol. 261] CHARLES GRADY WILLIAMS, the next witness called by the Defendant, having first been duly sworn, testified as follows, to wit:

Direct examination.

By M . Case:

Q. Would you tate your name, please, sir?
A. Charles Gr v Williams.
Q. Where do y live, Mr. Williams?
A. Mineola.
Q. Who do you w rk for?
A. Texas & Pacific Railway.
Q. Speak up just a little louder so everybody can hear you. Texas & Pacific Railroad?
A. Company.
Q. And what is your job?
A. Engineer; locomotive engineer.
Q. How long have you been working for the T & P, Mr. Williams?
A. Thirty-one year.
Q. How long have you been an engineer?
A. Since 1936.
Q. What was your job before that?
[fol. 262] A. Fireman.
Q. Mr. Williams, I call your attention to August 20th, 1952, and ask you whether or not you were the engineer on the T & P passenger train No. 6 that morning?
A. Yes, sir.
Q. And in which direction did No. 6 run?
A. East.
Q. From what town to what town?
A. Fort Worth to Dallas.
Q. Where had you gotten on the engine?
A. At Fort Worth.
Q. All right, sir. Did you have an accident that morning?
A. Yes, sir.
Q. Was that when a man was struck out here in West Dallas?
A. Yes, sir.
Q. And about what time of the day did the accident happen?

A. I believe it was around about 8:30 A. M.

Q. All right, sir. As you approached the area where the men were working out there, were there any sort of signs along the track, signals?

A. Well, there were slow signs, signals. Well, I would call it a slow board.

Q. All right, sir.

A. To indicate workmen was working on the tracks.

Q. All right, sir, and about how far was that board [fol. 263] located from the first machine that you came to?

A. I think it was about three-fourths of a mile.

Q. All right, sir. What, if anything, did you do as you approached that board?

A. Well, I answered the slow board with a whistle signal.

Q. What kind of a signal did you give?

A. That would be a long and two shorts, and a long blast of the whistle.

Q. All right, sir. As you approached that board, approximately how fast was your engine running?

A. Well, somewheres around sixty miles an hour.

Q. All right, sir. After you reached the board, what if anything did you do about your speed?

A. Well, I reduced the air and set the brakes in order to reduce my speed.

Q. And the jury doesn't understand about the operation of brakes on locomotives, I am sure; what do you mean by reduce the air?

A. Well, when you set your brake valve, why, that sets the brakes and that reduces your train line pressure, is what you set your brakes on the train.

Q. All right. All right, sir. Did you slow the train down any?

A. Yes, sir.

Q. After you got to that slow board did you come to any [fol. 264] other sort of signal or board before you reached these machines?

A. No, sir.

Q. All right, sir. And what was that—what did that slow board indicate, you say?

A. Well, in there it indicates that workmen was on the track working on the tracks about three-fourths of a mile from this board.

Q. All right. And did you get your train slowed down from about sixty miles an hour before you reached that first machine—

A. Yes, sir; I got it down to about eight—

Q. Excuse me. Go ahead.

A. Eighteen or nineteen miles an hour before I hit the restricted track.

Q. All right, sir, and after you answered that slow board, did you or not ever sound your whistle again?

A. Yes, sir; I whistled at a road crossing signal just as I was approaching the restricted track area.

Q. What is a road crossing signal?

A. Well, at that time it was two longs and two shorts.

Q. All right. Now, then, did you have your train down to eighteen or nineteen miles an hour before you reached that first machine on the West end?

A. Yes, sir.

Q. All right, sir. Then did you continue at that rate [fol. 265] of speed until you got to the East machine or not?

A. Yes, sir.

Q. Did you pick up any speed before you got to the East machine?

A. No, sir; I did not.

Q. All right, sir. What, if anything, did you do about the bell on that engine before the time you got to the restricted track area?

A. I turned the bell on; it were ringing.

Q. How do you turn it on?

A. It has just got a little valve up there that you just turn the valve one way—one turns it on one way and the other turns it off.

Q. You don't have to pull the cord like you used to?

A. No.

Q. Is that what is known as an automatic bell ringer?

A. It rings with air.

Q. All right. And was the bell still ringing at the time you had the accident, or not?

A. Yes, sir.

Q. What about the headlight; was the headlight on or not?

A. Yes, sir.

Q. All right, sir; I understand you had the accident about even with the East machine?

A. Yes, sir.

[fol. 266] Q. The second machine?

A. Yes, sir. The second one.

Q. All right, sir; just tell the jury, please, sir, approximately how far you were from Mr. Baker, the man that got hit, when you first saw him?

A. Well, I imagine it was around twelve or fifteen feet when I first seen him.

Q. All right, sir. What was he doing at that time?

A. Well, he was standing with his back to me and looked like he was emptying a sack of cement in this machine.

Q. All right, sir; did you continue to watch him?

A. Yes, sir; I kept watching him pretty close, going along there pretty slow, too.

Q. What did he do next?

A. Well, when I got to about eight or ten feet of him why it seems that he was clear of the track, but he turned—he throwed his sack down; I presume he had it empty, and turned and stepped toward the engine, toward the track right in front of the engine.

Q. All right, sir. When you first saw him was he in the clear or was he in a place where he would be hit?

A. He was in the clear, when I first seen him.

Q. All right, sir. When he stepped toward the track, what, if anything did you do?

A. Well, I reached for the brake valve.

[fol. 267] Q. Did you get the brake valve before you hit him?

A. Yeh; I had gotten the brake valve and made a service application of the brakes.

Q. Why didn't you make an emergency application?

A. Well, by that time I had done hit the man and didn't feel like it was necessary; I had done all I could do, so I didn't want to upset the passengers that was on the train.

Q. All right, sir. Before you reached either of those machines, did you look to see if the tracks were clear then of men?

A. Well, yes, sir; they were all on the side of the track there, all clear of the track when I reached up pretty close

to the restricted track; they weren't working; they had all walked off away from the track.

Mr. Case: All right. That's all.

* * * * * * *

[fol. 309] R. L. SLATON, the next witness called by the Defendant, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Case:

Q. State your name, please?
A. R. L. Slaton.
Q. Where do you live, Mr. Slaton?
A. 107 Damon Street, in Terrell.
Q. Who do you work for?
A. T & P Railroad.

Mr. Case: Can all of you hear Mr. Slaton?

Q. How long have you been working for the T & P, Mr. Slaton?
A. Well, about fourteen years.
Q. What department do you work in?
A. In the track department.
Q. Track department?
A. Yes, sir.
Q. Were you working for the T & P on August 20th, 1952?
A. Yes, sir.
Q. What was your job at that time?
[fol. 310] A. I was inspector.
Q. Where you working out here in West Dallas?
A. Yes, sir.
Q. At Eagle Ford?
A. Yes, sir.
Q. And there was some grouting work going on on the track out there?
A. Yes, sir.
Q. Were you present at the time Mr. Claude Baker was struck by a train?

A. Yes, sir.

Q. All right. Before the accident, say two or three or four or five minutes before the accident happened, where were you standing?

A. Between the two tracks.

Q. Up on the dump in between the two main line tracks?

A. Yes, sir.

Q. All right, sir, and did you ever notice a Westbound train?

A. Yes, sir.

Q. What called your attention to it?

A. Well, he was blowing his whistle and it was time for him; we were all looking for him.

Q. All right, sir.

Mr. Baker: Now, if the Court please, I object to that [fol. 311] portion of his statement, "We were all looking for them", being a conclusion of the witness.

The Court: Yes; I sustain the objection.

Q. All right, sir; insofar as you were concerned, were you expecting them?

A. Yes, sir.

Q. And you heard a whistle?

A. Yes, sir.

Q. All right. Were you also expecting any other train?

A. Yes, sir.

Q. What were you expecting?

A. I believe it was "21".

Q. Now, "21" was the Westbound train, wasn't it?

A. Yes, sir.

Q. What I am asking you, besides "21" were you expecting any other trains?

A. Yes, sir; No. 6.

Q. All right, sir. Now, did you ever notice No. 6?

A. Yes, sir.

Q. What called your attention to it?

A. Well, after I saw No. 21 I just turned around and knew it should be about time for the other one.

Q. All right, sir, and did you see it?

A. Yes, sir.

Q. I'll ask you whether or not you ever heard No. 6 sound [fol. 312] a whistle or a horn?

A. Yes, sir.

Q. All right, sir; did it sound it once or more than once?

A. About four times.

Q. All right, sir. Now, when you saw those trains, what did you do?

A. I hollered "hot rail".

Q. All right, sir; did anyone else holler "hot rail"?

A. Yes, sir; they all hollered.

Q. All right; before those two trains approached, were there men working up on the tracks or between the tracks?

A. Yes, sir; they was working on each side of it.

Q. All right. Now, was there anyone else standing there with you or close to you?

A. No, sir.

Q. All right, sir; and when the whistles were sounded and the men hollered "hot rail", what did the people do?

A. They cleared the tracks.

Q. All right.

A. Some went on one side and some went on the other.

Q. All right. Now, which side did you go on?

A. I went on the South side.

Q. All right, and did you or not observe the movement of No. 6, the Eastbound train?

[fol. 313] A. Yes, sir.

Q. All right, and did you watch it close enough to form an opinion as to how fast it was going?

A. Yes, sir.

Q. How fast was it going?

A. Well, approximately twenty miles an hour.

Q. All right, and did you hear—did you notice whether or not the bell was ringing on the train?

A. Yes, sir.

Q. Was it ringing?

A. Yes, sir.

Q. Did you have any difficulty in hearing the whistle or bell on that engine?

A. No, sir.

Q. I direct your attention to the headlight on that engine; was it on or not?

A. Yes, sir.

Q. All right. Now, did you see Mr. Baker get struck?

A. No, sir; not definitely; no.

Q. All right, and just before the accident happened, did you look to see whether all of the men out there were in the clear or not?

A. Yes, sir.

Q. Were they?

A. Yes, sir.

[fol. 314] Q. Were they?

A. Yes, sir.

Q. Now, what was your job as inspector?

A. Well, I was to put up the slow flags and see that they had materials there and see that the company got what the contract called for.

Q. All right. Did you ever have any occasion to discuss with anybody out there whether the company was getting what the contract called for?

A. State that a little plainer, please?

Q. All right. Did you ever see them doing something different from what the contract called for?

A. No, sir.

Q. All right. Did you give instructions to the men that were working for Nichols?

A. No, sir.

Mr. Case: All right; I believe that is all.

* * * * * * *

[fol. 330] Cross examination.

By Mr. Baker:

Q. Now, your job was inspector out there, wasn't it?

A. Yes, sir.

Q. Well, let me ask you about this. They had to mix [fol. 331] Cement and water and sand out there, didn't they?

A. Yes, sir.

Q. And then they pumped that into the ground?

A. Yes, sir.

Q. And they had to get the right mixture in the machine, didn't they?

A. Yes, sir.

Q. And somebody had to watch the points where—the places where they drive these points?

A. No, sir.

Q. Into the ground?

A. No, sir; I don't think so.

Q. Well, now, how did they know about that, how did they go about doing it?

A. Well, it was entirely up to them; I didn't have anything to do with that.

Q. Well, there is a reason for putting these points into the ground, isn't there?

A. Yes, sir.

Q. And generally you put them where the embankment was giving way, don't you, to re-enforce it?

A. Yes, sir.

Q. For instance, there would be a crack or a crevice there in the bank where the bank was giving way?

A. Yes, sir.

[fol. 332] A. Yes, sir.

Q. And if you got a crevice right along here (indicating), and you have got a good foundation back over here, there is no point in driving the point over here, is there?

A. They did.

Q. They would drive it over here?

A. Yes, sir; one way.

Q. Well, even though there was a bad place down there?

A. They covered the whole section.

Q. How close did they drive those points down; was there any certain number of feet?

A. Not that I remember, no.

Q. Well, how did W. H. Nichols' men know where to drive them then?

A. They had the location they would drive them and drove them solid.

Q. Well, how did they get the location to drive them?

A. The company give them the location.

Q. Who in the company give them the location?

A. In the engineering department.

Q. They gave them a set of specifications and plans to cover the locations?

A. Give them the locations, yes.

Q. Well, now, let's take this represent—let's let this rail here represent a section of track. You mean that the com-
[fol. 333] pany gave them a set of plans saying, "You drive a point here and you drive a point here and you drive one down there"?

A. No, sir.

Q. That didn't happen, did it?

A. No, sir.

Q. Now, isn't it the truth of the matter that they only drove those points in that portion of the track where they needed to pump sand and cement in there?

A. They had the sections laid out in the—

Q. Who laid them out?

A. It was laid out through the engineering department.

Q. Well, did they give them a blueprint of the track or how did they do it; that is what I am trying to get at.

A. They gave them the location in feet.

Q. They just gave them a certain number of mile posts to work within, didn't they?

A. Yes, sir.

Q. And within that mile post they were to drive that—these points, weren't they?

A. Yes, sir.

Q. Now, then whether there were ten in there or twenty to be driven in there, who was that up to?

A. It was up to Mr. Nichols.

Q. Up to Mr. Nichols? Now, The T P—

A. Uh huh.

[fol. 334] Q. Now, the T P is paying Mr. Nichols so much per cubic foot, isn't it?

A. Yes, sir.

Q. And it was your job out there to see that the work was done right?

A. Yes, sir.

Q. And you said you didn't have anything to do with it?

A. No; no more than just see that the company got the mixture that the contract called for.

Q. Well, the more they pumped into the ground the more they made, didn't they?

A. Yes, sir.

Q. Now, you wouldn't be out there on the job, for instance, and you saw Nichols drive a point up here and then

step over here a foot and drive a point and they got paid for that, didn't they?

A. Yes, sir.

Q. Every cubic foot they drive in there, they get paid for it?

A. Yes, sir.

Q. And then step down here and drive another one if it didn't need to be done there—you wasn't working for the company to let them get cheated like that, were you; you would say, "Look here, fellows; isn't no use putting that point in the ground there; bring it down here and put it in here", wouldn't you do that?

[fol. 335] A. I don't have anything to do with that.

Q. You just went out there and just let them go on and do that?

A. That's right.

Q. You never said a word in the world to them if you thought that they were pumping mud in that embankment and that your company was going to have to pay for it; you would just sit out there and not say a word—is that what you are telling us?

A. That's right.

Q. Well, did you report it to anybody?

A. No, sir.

Q. You didn't even report it to anybody; you just would be out there on the job and say, "Here goes sand and gravel down in there and I am paying so much a cubic foot for it; let them pump it in and pump it in", and you wouldn't say anything to anybody about it?

A. That's right.

Q. All right. Well, what about this; you see or have seen the times out there, haven't you, when this cement would run out the side of the dump?

A. Yes, sir.

Q. Wasting, so to speak?

A. Yes, sir.

Q. Break loose?

[fol. 336] A. Yes, sir.

Q. It would bubble up sometimes?

A. Yes.

Q. And you were having to pay for that, weren't you?

A. Yes, sir.

Q. Did you ever say anything to the fellows, "Now, look here; that stuff is running out the side; stop that"?

A. That was entirely up to Mr. Roskydoll.

Q. Did you ever say anything to them yourself about it?

A. No, sir; I didn't or don't tell the men what to do out there at all.

Q. You were out there on the job?

A. That's right.

Q. And you saw that happen?

A. That's right.

Q. And you knew your company was paying for it?

A. Yes.

Q. And you knew that all of that that bubbled up was going down the track—down the dump there?

A. Yes, sir.

Q. Down the drain, so to speak?

A. Yes, sir.

Q. And you never said, "Look here, you are doing that; that is not right"?

A. That's right.

[fol. 337] Q. And you were the inspector out there?

A. That's right.

Q. And you say you never told them anything about how much cement to use or how much sand to put in there?

A. They already had a contract for so much to be put in, through the contract, and that was not my business.

Q. Did you ever say anything to them if it got too thin out there?

A. No, sir.

Q. Or too thick?

A. No, sir.

Q. You would just let it go?

A. That's right.

Q. Well, now, of course, the purpose of putting that in there was to bolster the roadbed—is that right?

A. That's right.

Q. And if they got too much in the roadbed it would buckle the track, wouldn't it?

A. That's right.

Q. And did you ever say there, "Fellows, look; you all are getting too much of this in this track here; it will buckle the track, the rails"?

A. No, sir. Me and Mr. Roskydoll would talk about it and at the beginning of every day, and he took care of that.

Q. You were out there on the job?

[fol. 338] A. Yes, sir.

Q. And come up here and see this cement in here and you see it coming up and buckling this track, did you say anything to those point men and say, "Don't do that"?

A. Well, if it gets to the point out there—

Q. Yes, sir, and it did; you didn't testify to that on the last trial, did you?

A. I don't remember.

Q. Didn't you tell me on the last trial that you would stand out there and if they pulled a point up here and drove it in and it got too much cement in there and buckled up as high as a mountain you wouldn't say a word about it?

A. I might have.

Q. Well, didn't you? Didn't you say that?

A. I don't remember whether I did or not.

Q. Well, let's see on page 229. "And if you saw it was —no; here it is. "If you saw them put a hunk in there as big as a mountain, you would just stand there and let it go?"—and what is your answer (indicating)?

A. "That's right"?

Q. "That's right"; isn't that what you told us then?

A. Well—

Q. The last time, isn't that what you told us?

A. You were referring to the men. I was talking about the foreman.

[fol. 339] Q. Read it again, "If you saw them put a hunk there as big as a mountain, you would just stand there and let them go", and you said, "That's right".

A. That's right.

Q. And you wouldn't do that, would you; you wouldn't do that, would you?

A. With the men I would.

Q. You wouldn't let the men work right there and buckle the track without saying something to them about it, would you?

A. I wouldn't have anything to do with their men. No.

Q. Well, did you do it, then; would you just let it stay like that right there and let them continue to pump that stuff in there without saying a thing about it?

A. I would say something to the foreman about it.

Q. Now, to Mr. Roskydoll?

A. That's right.

Q. And tell him what, then?

A. Tell him that they was humping the rails.

Q. And to stop it, wouldn't you?

A. He could do as he pleased about it.

Q. I say, you would tell him to stop it, wouldn't you?

A. I would, yes.

Q. All right. Now, did the railroad company furnish the sand out there—didn't they?

A. Yes, sir.

[fol. 340] A. Yes, sir.

Q. And they furnished the cement?

A. Yes, sir.

Q. And furnished the water? Who furnished the water?

A. They did.

Q. The railroad company provided the transportation for the materials out there, didn't they?

A. No, sir.

Q. Sir?

A. No, sir; they hauled it out theirselves.

Q. They hauled it out in their truck?

A. Yes, sir.

Q. They didn't haul it on railroad cars?

A. No, sir.

Q. And those tracks out there, those were mainline tracks, weren't they?

A. Yes, sir.

Q. Sir?

A. Yes, sir.

Q. That is the through tracks operating from Louisiana through Texas, from Arkansas to Texas and so on?

A. Yes, sir.

Q. Did you ever hear Mr. Roskydoll tell the men where to put the points down?

A. No, sir.

[fol. 341] A. No, sir.

Q. Never heard him tell them that?

A. No, sir.

Q. It was just left up to the men?

A. Well, I suppose he told them; I didn't.

Q. I say, you never heard him tell them, though?

A. No, sir.

Q. So far as you know, it was left up to them?

A. That's right.

Q. Now, there was no particular skill about putting these points in the ground, was there?

A. No, sir.

Q. Most of these men that were working out there were uneducated laboring men, weren't they?

A. Well, I wouldn't say that.

Q. Well, you have been out there with them, you know that they were not men of education and skill and training, don't you?

A. Well, part of them were.

Q. Yes, and there is no skill required in mixing sand and cement there, is there?

A. No, sir.

Mr. Baker: Just a second, your Honor. I believe that is all.

(Conference Between Counsel for Plaintiff)

(Conference at Bench)

[fol. 342] Q. What is the right mixture; you said you had to see that they had the right mixture; what is the right mixture?

A. Sixteen to one.

Q. Sixteen to one?

A. Yes, sir.

Q. Sixteen what to one?

A. Sixteen parts sand to one part cement.

Q. To one part cement?

A. Yes, sir.

Q. And you say that is your only job out there, to see that that is what you got?

A. Yes, sir.

Q. Did you stay there by the machine and see they didn't make it fourteen to one?
A. Yes, sir.
Q. Or thirteen to one?
A. That's right.
Q. Or ten to one?
A. That's right.
Q. And that is what you were out there for?
A. Yes, sir.

Mr. Baker: That's all.
The Court: All right.

Q. Were you out there every day?
A. Yes, sir.

[fol. 343] The Court: Is that all of this witness?
Mr. Baker: Yes, sir.
Mr. Case: May this witness be excused?
The Court: Yes; you may be excused.

(Witness excused)

(The Rule Explained to Previous Witness)

The Court: All right. Let's take a ten minute recess now.

RECESS

9:45 A. M., October 4, 1956

The Court: All right; who will you have?
Mr. Case: Mr. Snodgrass.
The Court: Raise your right hand.

(Witness sworn)

The Court: Take the stand.

* * * * * * *

[fol. 346] H. H. Miller, the next witness called by the Defendant, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Case:

Q. State your name, please, sir?
A. H. H. Miller.
Q. What business are you in, Mr. Miller?
A. Construction.
Q. How long have you been in business—do you own that business?
A. I do.
Q. How long have you been in business for yourself?
A. Oh, about eight years; seven or eight years.
Q. Have you also been employed by W. H. Nichols & Company?
A. Yes, sir; I was up until about three months ago.
Q. All right. And were you employed by W. H. Nichols & Company on August 20th, 1952?
A. Yes, sir.
Q. What was your job with that company?
A. General superintendent.
Q. Were you out around Eagle Ford on the morning of August 20th, 1952, when Claude Baker was struck by that train?
[fol. 347] A. Yes, sir.
Q. About how long had you been out there before the accident?
A. Well, I had—shortly after 8:00 o'clock I got there and I don't know—I don't remember offhanded the exact time of the accident.
Q. All right.
A. Between 8:00 and 9:00 o'clock.
Q. Were the men working when you got there?
A. Now, our men?
Q. Yes, sir.
A. Yes, sir.
Q. All right. Calling your attention to the time before, just before the two trains got there, about the scene of the accident, where were you?

A. I was up on the shoulder of the roadbed.

Q. Were you standing there by yourself or was someone with you?

A. No; I was talking to Mr. Roskydoll, who was the foreman there.

Q. He was foreman of the East machine?

A. Yes, sir.

Q. All right. As you were standing there talking to him did you notice a train coming from either direction?

A. Yes, sir; there was a train approached—Westbound [fol. 348] train approaching the job first.

Q. What called your attention to it?

A. Well, they blowed the train whistle and the cautious—I noticed his lights at the caution signal.

Q. All right. You heard it?

A. Yes, sir.

Q. And did you notice the Eastbound train?

A. Yes, sir; I did.

Q. What called your attention to that?

A. Well, I was looking toward the West and I noticed this train also blew his whistle as he had got to the caution sign.

Q. All right, and what about his lights?

A. It was also on.

Q. All right, sir. Did you say anything to the men when you saw the trains?

A. I told Roskydoll that there was a train and then he hollered "hot rail" and the men that were working there—at the time he had them all shut down because they were shut down previous to the Westbound train approaching.

Q. All right. And he hollered "hot rail"?

A. Yes, sir.

Q. Did anybody else holler "hot rail"?

A. Well, there was some other fellows hollered "hot rail" but I never noticed exactly who they were.

[fol. 349] Q. All right. Did you stand there long enough to see whether everybody got clear of the tracks or not?

A. Yes, sir. I did.

Q. Was everybody in the clear?

A. Yes, sir; they were.

Q. What did you do then?

A. Then we walked down the shoulder toward my car, which was East of the machine on the South side—both machines were on the South side of the Eastbound track.

Q. And did you see the accident?

A. No, sir; I didn't.

Q. All right. Now, did you observe the movement of the Eastbound train enough to judge how fast it was going?

A. Yes, sir; I would say the train was travelling about fifteen miles an hour.

Q. All right, sir. Had you been out there at that job location before?

A. Yes, sir; I had been there I think once previous to that.

Q. Once?

A. I don't know—I don't know that is exactly the location where I was; it has been so long ago.

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[fol. 369] (End Bills of Exception—The Jury In)

William J. Savage, the next witness called by the Defendant, having first been duly sworn, testified as follows, to wit:

Direct examination.

By Mr. Case:

Q. Will you state your name?

A. William J. Savage.

Q. By whom are you employed?

A. By the Texas & Pacific Railroad.

Q. And in what capacity?

A. As Assistant Chief Engineer.

Q. Professional engineer as contrasted to a locomotive engineer?

A. Yes, sir.

Q. And how long have you been so employed?

A. A little over eight years.

Q. And who did you work for before going with T & P?

A. I worked for the Missouri-Pacific Railroad before going with T & P.

Q. All right. And in your capacity of your present em-
[fol. 370] ployment, what is, generally speaking, your job? What do you have supervision over?

A. Generally I have supervision over maintenance of tracks and structures, under the Chief Engineer.

Q. Now, Mr. Savage, are you familiar with a contract under which W. H. Nichols & Company performed on grouting work for the T & P out here around Eagle Ford back in 1952?

A. Yes, sir.

Q. All right. Let me ask you this. Did you or not advertise for bids for that particular work?

A. We sent our proposal out to the contractors, as I recall, for that particular work, to two contractors.

Q. And who was the other contractor besides Nichols?

A. I believe the proper name of the company is Better Welding Company of Fort Worth.

Q. And did you receive bids from both companies?

A. Yes, sir; we did.

Q. And on the basis of the bids you selected Nichols?

A. Yes, sir.

Q. All right. Now, Mr. Savage, did you or anyone connected with the T & P undertake to direct Nichols or his employees in the details of the grouting work that they performed under that contract?

A. Not in the details of the work; no, sir.

Q. What did you do in that respect?

[fol. 371] A. We specified the locations of the work and specified the degree to which we wanted the work completed.

Q. All right, sir, but as far as telling them how to do the work, did you do that?

A. No, sir.

Q. Now, the Plaintiff in the papers filed in this Court has alleged in effect that this contract was a scheme or device to get around the Federal Employers Liability Act. Is that true, Mr. Savage?

A. I would say not.

Q. All right, sir; why did you contract for this work?

A. Primarily because we did not have the equipment nor the knowledge that is necessary to do the work.

Q. All right, sir. And that sort of work, grouting, is that ordinary maintenance of a railroad?

A. No, sir. I would consider it rather extraordinary maintenance.

Mr. Case: All right. That's all.

Cross examination.

By Mr. Baker:

Q. This is the contract, isn't it, Mr. Savage (hands to witness)?

A. Yes. sir; that is the contract.

Q. Now, may I see it just a second?

[fol. 372] A. Yes, sir; (hands to counsel).

Q. This contract didn't run for any specific length of time, did it?

A. I believe it stipulated it was to run until the work was completed.

Q. And did it cover any specific area?

A. The contract stipulates an approximate footage and specifies limits between two certain mile posts.

Q. Yes, but there was nothing in that contract as to the number of feet that would be worked, was there; there that was left open, wasn't it?

A. Well, in the contract it wasn't spelled out in detail, but the proposal which went out upon which the contract was based listed it in detail.

Q. But that proposal is not a part of this contract, is it?

A. I can't say.

Q. And was not attached to this pleading filed by the railroad company, was it, the proposal?

A. I don't see it.

Q. And all that was attached to that contract was a letter of December 2nd, 1952, addressed to W. H. Nichols & Company, whereby they would continue work under that contract at another location—that is correct, isn't it?

A. Well, this letter of December 2nd you refer to covers work at an entirely different location.

[fol. 373] Q. Yes, but it makes reference to this contract of April 1st, 1952, doesn't it?

A. That's right.

Q. So these two instruments, this letter of December 2nd, of 1952, and this contract, are all that are attached to this pleading?

A. I believe that's right.

Q. Yes, sir. Now, then, this contract did not cover any specific amount of money, did it; that was left open to be determined from time to time?

A. That is correct.

Q. Likewise, the number of feet is left open to be determined from time to time, wasn't it?

A. Yes, as to how much was done.

Q. Now, did your company have the right to cancel that contract?

A. Well, sir; I don't know.

Q. All right. Take a look here. There was nothing in there about cancellation, was there? At least I didn't find it, Mr. Savage; maybe you can find it.

A. Well, I wouldn't know without reading it.

Q. Well, we will take a minute and let you read it here (hands to witness, who examines instrument).

A. What was your question again?

Q. There was nothing in that contract about the right of [fol. 374] cancellation of either party, was there?

A. No, sir.

Q. So that at any time the T & P Railroad decided that between those areas the contractor had done all of the work that the T & P wanted them to, they could call a halt to the thing, couldn't they?

A. I couldn't say definitely that we could or we couldn't.

Q. Well, it is true, isn't it, that it didn't require any specific number of feet?

A. Not other than—

Q. Cubic feet of sand or gravel or cement?

A. That is correct.

Q. That is correct, isn't it?

A. Yes, sir.

Q. It just said, "We want you to do certain work within mile post 210 and mile post 240"—I mean, I am just using that for an example. That is correct, isn't it?

A. Yes.

Q. And whatever they put in the ground within that area you would pay them so much per cubic foot?

A. That is correct, except that we did specify approximately how much we wanted worked over.

Q. Yes, but in the meantime when you felt it desirable you had the right to say, "This is all we want done here in this area"?

[fol. 375] A. I think I could have left that to the contractor's judgment, as to whether or not he had completed the area.

Q. I am talking about the railroad company's right, if you felt that you wanted to cancel the contract, you wanted to stop it then and there, you had that right?

A. Well, I think we could—

Mr. Case: If the court please, that calls for a conclusion of law; this witness is an engineer; not a lawyer.

The Court: I sustain the objection.

Mr. Baker: Note our exception.

The Court: All right.

Mr. Baker: And I think the answer went in the record.

The Court: All right.

Q. Now, had you been out there on the job, Mr. Savage?

A. I made inspection trips infrequently.

Q. About how many times do you suppose you were out there?

A. Oh, as I recall, I would go out perhaps every second or third month.

Q. About how long a time would you spend out there?

A. Usually take about a half a day.

Q. And that would be the only occasion you had to go out there?

A. Unless some particular occasion arose, yes, sir.

Q. You had a Mr. Slaton out there?

[fol. 376] A. I did.

Q. What was his job?

A. He was inspector.

Q. What was he supposed to inspect?

A. Well, primarily to see that we got what we contracted to pay for.

Q. What do you mean by that?

A. Full measurement of the sand, for instance, that would go into the embankment, and full footage of track that was contracted on.

Q. Was he there for any other duties?

A. Yes; he was there to see that the track was safe for the operation of the trains.

Q. Well, just what do you mean by that, what did he have to do with that respect?

A. Well, in the grouting by pressure methods, it is very easy for a track to be humped or mashed up or thrown out of cross level.

Q. Because of pumping too much in the embankment?

A. That's right, and when that occurs it might make the track unsafe for the taking of trains over it.

Q. And he was out there to prevent that, wasn't he?

A. He was there primarily for that, yes.

Q. And if he saw that they were pumping too much cement into the embankment there, and it was buckling the [fol. 377] track, he had the right to say to Nichols and Company, "Now, you mustn't do this"? That is correct, isn't it?

A. Yes, sir.

Q. Now, who would determine, how would you go about determining where you would place these points—that is what they call them out there?

A. Grouting points.

Q. And they are pipes that stuck into the ground?

A. Yes; they call them grouting points.

Q. Grouting points? You would call them that. And who would determine where those grouting points were to be put in the embankment?

A. Well, the contractor's foreman, I would presume.

Q. Did they select the areas?

A. No, sir; we selected the general areas, but that was based on the unstable positions of the tracks—the condition of the roadbed that was out there.

Q. That is from mile post 210 to mile post 240, just for illustration?

A. Well, even a smaller or closer limits than that.

Q. Yes, sir. Well, now, of course, it stands to reason that you put—there is a definite reason for putting those into the ground, in other words?

A. Yes, sir.

Q. And it must be put in generally in the place where it [fol. 378] is needed?

A. That's right.

Q. And generally where it is needed is where there would be crevices in the ground or where the embankment had given way?

A. Not necessarily crevices. The grout takes care of water pockets in the embankment.

Q. All right. Now, where the water pockets are, now, the contractor doesn't determine where the water pockets are, does he?

A. No, sir.

Q. That is just within that given area there?

A. Yes.

Q. And a contractor or these men that are working for the contractor, they wouldn't know where the water pocket was, would they?

A. I wouldn't expect them to.

Q. No; that would be up to the railroad to say, "Now, there is a water pocket here and we want to have this particular part of the track grouted right here", wouldn't it?

A. We would specify within particular limits.

Q. And within those limits, the railroad would have to designate where the points would be put?

A. What is that?

Q. Within that area covered by the contract, the railroad would have to tell them where to put the points?

[fol. 379] A. No, sir.

Q. Well, how would the contractor go about telling when there was a water pocket and where it was?

A. He would use his own judgment.

Q. Use his own judgment about it?

A. We would specify limits of the unstable track and he would use his own judgment about where the points were placed.

Q. Well, suppose you were out there and there was a water pocket up here and wasn't a water pocket back there and they started to pumping this sand and cement down here, what would you do about that?

A. If it went into the embankment, it would indicate that it was doing some good.

Q. Well, if it—if you felt that it didn't belong in there and that wasn't the proper place, would you do anything about it?

A. I wouldn't say we would watch it for that detail.

Q. You would just let him go ahead and put it in there and pay for it?

A. Yes, sir. We would expect him when he got through with it to give us a stable section or roadbed.

Q. And even though he selected the place where you didn't feel it was necessary, you would go on and pay for it.

A. I didn't say I didn't feel it was necessary, because I didn't watch them that close.

[fol. 380] Q. Well, would you say you didn't have that right or would you have that right out there?

A. I presume we would.

Q. That is what I am getting at. Do you think—all right. The truth of the matter is, your duties require you to be out there very little?

A. That's right.

Q. And other than what you saw or heard when you were out there on those occasions, you don't actually know of your own knowledge what instructions Mr. Slaton gave, do you?

A. No, sir.

Q. You know, Mr. Savage, that employees engaged in interstate commerce are covered by what is known by the Federal Employers Liability Act?

A. No; I didn't know that; no, sir.

Q. You do not know that?

A. No, sir.

Q. Do you know what you pay ordinary track men, section workers, for work on a track?

A. Yes, sir.

Q. Was it higher or less than what you paid Nichols—what they paid their men?

A. I am not sure that I know what Nichols paid; I don't recall what they paid their men, but I think that our rates are higher than his.

[fol. 381] A. That's right. I think it would be.

Q. Yes, sir. Now, there isn't any particular skill required in mixing cement, is there?

A. No, sir.

Q. You knew that most of the workers out there were laboring men and rather uneducated, didn't you?

A. That's right.

Q. And there wasn't any particular skill in driving those points into the ground, was there?

A. Well, there might be some skill to that; I wouldn't say.

Q. Well, from what you saw out there, you saw those men operating those points, didn't you?

A. I doubt that anybody could go out and drive one of those points at a troublesome location; I think it took skill to get them in the ground.

Q. Well, that doesn't take—wouldn't be much different than me trying to drive a nail straight, not being a carpenter?

A. Well, I don't know—

Q. That is about all the skill it required, wasn't it?

A. I have never seen you drive a nail.

Q. Well, I can't drive a nail very straight: I will tell you that, but there wasn't any particular skill or training that was required for those men in driving those points?

A. I would say that there was about the same skill in [fol. 382] operating an air hammer or a paving breaking job or something of that kind.

Q. That is just about the extent of skill needed?

A. That's right.

Mr. Baker: I believe that's all.

Mr. Case: I have no more questions; may this witness be excused?

Mr. Baker: Yes, sir.

The Court: All right; you may go; I will give you this instruction.

(The Rule Explained)

(Witness excused)

[fol. 383] GLEN LAFEW, a witness called by the Defendant—

• • • • • • •

(Testimony not transcribed)

The Defendant Rests

The Plaintiff Rests

The Plaintiff Closes

The Defendant Closes

Testimony Closed

[fol. 384] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 385]

JUDGE'S AND COUNSEL'S CERTIFICATE TO STATEMENT OF FACTS

We, the attorneys of record for the Plaintiff and Defendant, respectfully, hereby agree that the above and foregoing pages and accompanying volumes hereof, contain and constitute a true and correct Statement of Facts covering the points ordered transcribed under agreement of the counsel for the parties hereto.

Witness Our Hands, this, the day of , 1957.

/s/ D. L. Case—for T & P Ry. Co., /s/ Mark Martin for W. H. Nichols & Co.

The above and foregoing Statement of Facts, certified to by the Official Court Reporter in and for said court and agreed to by the attorneys of record for Plaintiff and Defendant, having been presented to me, same is examined, approved and ordered filed as the Statement of Facts in this cause.

/s/ Paul Peurifoy, Judge.

[fol. 385a]

DEFENDANT'S EXHIBIT No. 1

Form 4 EMPLOYERS' LIABILITY ACT

NOTICE OF FATAL INJURY

INDUSTRIAL ACCIDENT BOARD

AUSTIN, TEXAS

Section 4a, Part II. Unless the association or subscriber (employer) have notice of the injury, no proceedings for compensation for injury under this Act shall be maintained, unless a notice of the injury shall have been given to the association or subscriber (employer) within thirty (30) days after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of same; or, in case of death of the employe or in the event of his physical or mental incapacity within six (6) months after the death or the removal of such physical or mental incapacity. Provided, that for good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice and the filing of the claim before the Board.

This is to notify you

Employers Mutual Liability Insurance Company of Wisconsin

(Name of employer, or insurance association or company with which employer is insured.)

that on the 20th day of August 1952, at about 8:35 o'clock a.m.

(A. M. or P. M.)

Claude Baker sustained fatal injury while employed

(Name of deceased employee.)

by W. H. Nichols & Company, Inc. .....

(Name of employer.) (City or town.)

The place of injury was

on Texas & Pacific Railroad tracks west of Dallas, Dallas County, Texas

(State name or description of building or place.)

The cause of death was He was hit by a train

(Describe cause of injury.)

State names and P. O. address of nearest relatives: Dovey Ray Baker (wife), Bobby Glen Baker (son), Claudette Baker (daughter), Olita Fay Baker (daughter) Crandall, Rt 1, Texas

/s/ Dovie Ray Baker
(Signature of claimant.)

Route 1
(Street and number.)

Crandall
(City or town.)

(Rubber Stamp)
Industrial Accident Board
RECEIVED
AUG 26 1952

State of Texas

Dated this 25th day of August, 1952

This notice should be executed in duplicate and one copy mailed to the Industrial Accident Board and the other copy delivered to the Employer or the Insurance Company or Association carrying his Insurance.

[fol. 385b]

Defendant's Exhibit No. 2

Form 5 EMPLOYERS' LIABILITY ACT

CLAIM FOR COMPENSATION FOR DEATH

Industrial Accident Board
Austin, Texas

Note:—This claim should be made out in duplicate; one copy thereof should be mailed to the Industrial Accident Board and the other copy should be delivered to the Employer or the Insurance Company or Association carrying his insurance.

This is to notify you
Employers Mutual Liability Insurance Company of Wisconsin
Name of employer or association or company with which employer is insured.

that I claim compensation from you under the Employers' Liability Act of Texas on account of the death of Claude Baker,
Name of deceased employee.

on the 20th day of August 1952, which resulted from injuries sustained on the 20th day of August 1952 while in the employ of W. H. Nichols & Company, Inc. .....
Name of employer. City or town.

The place of injury was
on Texas & Pacific Railroad tracks west of Dallas, Dallas County, Texas
State name or description of building or place.

The cause* of death was He was hit by a train
Describe cause of injury.

Name and P. O. address of witnesses in support of claim: .....

.....

.....

Give names and P. O. address of the Beneficiaries of the deceased (stating the kinship of each such Beneficiary to the deceased): Dovey Ray Baker (wife), Crandall, Rt. 1, Texas Bobby Glen Baker (son), Crandall, Rt. 1, Texas, Claudette Baker (daughter) Crandall, Rt. 1, Texas, Olita Fay Baker (daughter), Crandall, Rt. 1, Texas

Which of the legal Beneficiaries above name are minors? State ages Bobby Glen (11), Claudette (9) Olita Fay (6)

Length of time employed in same employment previous to date of injury about 4½ months
Years, months or days.

Wages of deceased employee on date of injury were $50.00 per week
Day, week or month.

Deceased was employed 5-7 days per week.
State whether 6 or 7 days.

This claim for compensation, with respect to such injury and because of the death of deceased, is made in behalf of and for each and all of

the legal Beneficiaries of the deceased, as well as by and for the undersigned, he herein acting for himself and such legal Beneficiaries.

/s/ Dovie Ray Baker
Signature of claimant.

Route 1
Street and number.

Crandall
City or town.

(Rubber Stamp)
Industrial Accident Board
RECEIVED
AUG 26 1952

State of Texas

Dated this 25th day of August 1952

* Note:—If it is claimed that the violation, by the employer, of any statute enacted for the safety of employees, contributed to or caused the injury or death of this employee, it is requested that this be so stated in this claim for compensation.

** Note:—Section 4a, Part II, Employers' Liability Act—Unless the association or subscriber have notice of the injury, no proceedings for compensation for injury under this Act shall be maintained unless a notice of the injury shall have been given to the association or subscriber within thirty (30) days after the happening thereof, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of same; or, in case of death of the employee or in the event of his physical or mental incapacity within six (6) months after the death or the removal of such physical or mental incapacity. Provided, that for good cause the board may in meritorious cases waive the strict compliance with the foregoing limitations as to notice and the filing of the claim before the board.

[fol. 386]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

No. 15,298

From a District Court of Dallas County.

DOVIE RAY BAKER, et al., Appellants,

v.

TEXAS & PACIFIC RY. Co., Appellee.

OPINION—December 6, 1957

The suit is prosecuted by appellant as administratrix of the Estate of Claude Baker, deceased husband, also as next friend of their three minor children, claiming liability against appellee Railroad Company for his death which occurred August 20, 1952. From a jury trial and finding of contributory negligence on part of said Claude Baker, a defendant's judgment resulted, and this appeal; the trial court rejecting plaintiff's assertion of rights pursuant to 45 USCA, sec. 51 et seq. (Federal Employers' Liability Act). Defendant Railroad had made W. H. Nichols & Company, Inc., a party hereto, and has appealed from the trial court's adverse ruling on its cross-action for indemnity against Nichols Company in event of liability to plaintiffs; details of which phase of the litigation will later appear.

On April 1, 1952 the Railroad and Nichols Company had entered into a written contract for grouting work between specified mile posts (pumping of sand and cement into roadbed under pressure for strengthening and stabilization). The Nichols Company was engaged in performance of this contract and Claude Baker, deceased, was on the job as one of its employees when struck by defendant's east-bound train. This contract is therefore quoted in full, together with supplement thereto of later date:

"This Agreement, executed in duplicate April 1, 1952 by and between The Texas and Pacific Railway Com-

pany, herein called Carrier, first party, and W. H. Nichols & Company, Inc., Dallas, Texas, herein called Contractor, second party; Witnesseth

"For and in consideration of the keeping by each of the parties hereto of the several covenants and agreements hereinafter set forth, it is hereby mutually agreed as follows:

[fol. 387] "1. Contractor shall within thirty (30) days after the execution of this contract begin and diligently prosecute the work described herein until completed in a first class and workmanlike manner and to the satisfaction of the Carrier's Chief Engineer or his duly authorized representative. The work to be done by the Contractor shall consist of:

"Furnishing labor, equipment and water for grouting roadbed on Carrier's double track main line at locations between Mile Post 215, near Dallas, and Mile Post 230, near Arlington, Texas, as specified by Carrier's Chief Engineer or his representative. Area to be grouted consists of a total or approximately 42,040 track feet.

"2. For the faithful performance of the work by the Contractor, The Carrier shall make and Contractor shall accept payment at prices or rates as follows: $0.10 per linear track foot of roadbed grouted, plus $0.30 per cubic foot of sand pumped into roadbed measured dry. Payment hereunder is to be made promptly upon completion and acceptance of the work, if completed within 30 days; otherwise, payment shall be made at the end of each 30 days as the work progresses. Contractor, if called upon, shall furnish Carrier written evidence that he has paid in full all amounts that may be due by him to any and all persons who may perform labor or furnish material or supplies in connection with said work; and in the event he fails to furnish satisfactory written evidence thereof Carrier may withhold payment pending receipt of such written evidence.

"As one of the considerations hereof Carrier, insofar as it lawfully may do so shall transport free to the site

of the work and, after completion of the work therefrom not exceeding an equal distance, via solely the line of Railway of Carrier, Contractor, Officers, men, teams and equipment actually engaged on or in connection with the work, but excluding fuel, supplies and explosives; and all such transportation shall be at Con- [fol. 388] tractor's risk in case of accident or damage.

"3. In the performance of any of the work or services herein provided, or any part thereof, Contractor shall occupy the status of an independent contractor, and shall not be subject to the detailed supervision and direction of Carrier, but responsible to Carrier only for the final results in the accomplishment of such work or services.

"4. Contractor shall and does hereby assume full responsibility for and agrees to defend, indemnify and hold the Carrier harmless from any and all liability, damage and expense which the Carrier may incur or suffer by reason of (a) any breach by Contractor of any of the covenants herein contained, (b) injury to or death of any persons, or loss, damage or destruction of or delay to any property, arising out of, resulting from or incident to the performance or nonperformance of any of the services and obligations herein assumed by Contractor and (c) transportation of persons and property by Carrier in conformity with paragraph 2 hereof.

"5. Contractor assumes any and all liability for and agrees to indemnify Carrier against any and all taxes, contributions and comparable payments imposed by or arising under any municipal, State or Federal law, order or regulation upon or incident to the payment by Contractor of wages, compensation or other forms of remuneration to persons in his employ, performing the services provided for herein, or any part thereof. * * *."

(Supplement)

"December 2, 1952.
File: 330-2

"W. H. Nichols & Company, Inc.
3015 Grand Avenue
Dallas 10, Texas

Gentlemen:

"Please refer to our contract dated April 1, 1952, covering grouting of roadbed between our Mile Post 215, near Dallas, and Mile Post 230, near Arlington, unit prices covered by this contract being 10¢ per lineal [fol. 389] foot of roadbed grouted plus 30¢ per cubic foot of sand pumped into roadbed, measured dry.

"The above mentioned contract, while not limited as to period of time, is limited as to location of work. We wish to continue this work during the year 1953, working to vicinity of Mile Post 244, just east of Fort Worth. Preliminary survey indicates that we will wish to grout approximately 20,000 lineal feet in addition to that covered by present contract, although it may develop more grouting than this is desired as we proceed with the work.

"If you are agreeable to doing this grouting work as indicated under the same terms as provided in contract dated April 1, 1952, please so indicate by accepting in space provided below and returning original of this letter to me for our record. Yours very truly, (Signed) R. J. Gammie, Chief Engineer.

Accepted: W. H. Nichols & Company, Inc. By (Signed) W. E. Nichols, W. E. Nichols Title: President."

Above contract was entered into as a result of appellee having advertised for bids, receiving one other bid from a Fort Worth concern.

Appellants predicate their claim to benefits under the Federal Employers' Liability Act on the following allegations of petition on which they went to trial: "IV. That on or about the 1st day of April, 1952, and the 2nd day of

December, 1952, Defendant, The Texas & Pacific Railway Company, entered into contracts and agreements with W. H. Nichols & Company, Inc. whereby the said W. H. Nichols & Company, Inc. was to perform certain maintenance and repair work on Defendant's roadbed in Dallas County, Texas; *that said work was a part of the regular maintenance and upkeep of Defendant's line of railway track then in use in interstate commerce* and said contract, while purporting to constitute W. H. Nichols & Company, Inc., an independent contractor, *was in truth and in fact an effort* [fol. 390] *and attempt to evade the provisions of the Federal Employers' Liability Act;* that Defendant, Texas & Pacific Railway Company, at all times mentioned in this petition, had the right to control the details and the manner, means and method by which W. H. Nichols & Company, Inc. performed said work." (Emphasis ours.)

Primary points of appeal center on the trial court's refusal to submit plaintiff's issues 1, 12 and 13. Issues 1 and 13 being similar in form, No. 1 only is quoted along with No. 12: (1) "Do you find from a preponderance of the evidence that with reference to the work W. H. Nichols & Company, Inc., was performing at the time Claude Baker, deceased, was killed, W. H. Nichols & Company, Inc., was not an independent contractor?" (followed by definition of "independent contractor"). Issue 12: "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude Baker, deceased, and that attributable to defendant, Texas & Pacific Railway Company? Answer: Attributable to Claude Baker, deceased, ... per cent. Answer: Attributable to The Texas & Pacific Railway Company, ... per cent."

Original petition of Dovie Ray Baker was in form of an action at common law, suing individually and as next friend of the minor children of herself and husband; in first amended original petition asserting coverage of the Federal Employers' Liability Act; in October 1955, qualifying as administratrix, and in third amended original petition of September 1956, suing as "personal representative" of deceased as required by sec. 53, Title 45, USCA; and alternatively as at common law.

This is a second trial of the case. Prior to any suit, however, but following the death of Claude Baker, appellant wife had filed her notice of fatal injury and claim for workman's compensation benefits with the Industrial Accident Board of Texas; both instruments reciting that the employer of deceased was W. H. Nichols & Company, Inc. Employers Mutual Liability Insurance Company of Wis- [fol. 391] consin, compensation carrier, in due course recognized liability and made a lump sum settlement on account of the death of Claude Baker, paying workmen's compensation benefits in the sum of $7,919.94. It was developed from witnesses for plaintiff at the trial that Claude Baker had been hired by Nichols' foreman, who told the crew when to come to work and what to do; when to quit and when the machines were to be moved; that they were paid for their work by Nichols who deducted for their income taxes and social security; that defendant Railway paid them no money, made no deductions from salaries, never told them when to report for work or to quit work; deceased telling his wife that he was employed by W. H. Nichols & Company.

Points of appeal may be summarized in part: The trial court's error (1) in failing to submit plaintiffs' requested issue No. 12, "inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers' Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue"; (2) in failing to submit issue No. 1 or No. 13, the evidence being sufficient to raise the question of whether or not W. H. Nichols & Company, Inc. was an independent contractor; (3) in overruling plaintiffs' objection to a statement made by defense counsel while interrogating the jury panel as a whole "that Plaintiff had filed a claim for workmen's compensation benefits alleging that Claude Baker was an employee of W. H. Nichols & Company, Inc., and had processed that claim to final disposition before the Industrial Accident Board, and in overruling Plaintiffs'

motion to instruct the jury not to consider such statement"; (4) in admitting in evidence the notice of injury and claim for compensation "filed by Plaintiffs with the Industrial Accident Board alleging that Claude Baker was an employee [fol. 392] of W. H. Nichols & Company, Inc., which were offered by Defendant, and in failing to instruct the jury, as requested by Plaintiffs, that such evidence was admissible for impeachment purposes only"; (5) in permitting counsel for defendant to read to the jury over plaintiff's objection "paragraph 9 of the third amended original answer, wherein reference was made to claim for compensation Plaintiffs had filed with the Industrial Accident Board based upon the assertion that Claude Baker was an employee of W. H. Nichols & Company, Inc."; (6) in failing to grant "Plaintiffs' motion to withdraw from the consideration of the jury notice of injury and claim for compensation filed with the Industrial Accident Board by Plaintiffs, alleging Claude Baker was an employee of W. H. Nichols & Company, Inc., because such evidence, if admissible at all, was admissible for impeachment purposes only, and the court having failed to submit Plaintiffs' theory that Claude Baker was covered by the provisions of the Federal Employers' Liability Act as an employee of Defendant, such exhibits were not relevant to any issue to be decided by the jury and were highly prejudicial and inflammatory"; (7) in overruling plaintiffs' motion "made prior to the time Plaintiff Dovie Ray Baker took the witness stand, to instruct counsel for Defendant not to interrogate her concerning the Notice of Injury and Claim for Compensation filed by Plaintiffs with the Industrial Accident Board based upon the assertion that Claude Baker was an employee of W. H. Nichols & Company, Inc. and that said claim had been processed to final disposition."

Counterpoints of defendant should be noted in this connection: That the trial court *did not err*: (1, 2) in failing to hold that, as a matter of law, the evidence established that Claude Baker was covered by the provisions of the Federal Employers' Liability Act because there was no evidence (or insufficient evidence of probative force) "that Appellee entered into the contract with W. H. Nichols & [fol. 393] Company, Inc. for the purpose or with the intent of evading the provisions of the Federal Employers' Lia-

bility Act"; (3, 4) in failing to hold that, as a matter of law, the evidence established that Claude Baker was covered by the provisions of the Federal Employers' Liability Act because there was no evidence (or insufficient evidence of probative value) that the work in question was regular railroad maintenance; (5, 6) in failing to submit plaintiffs' requested issues 1 or 13 because there was no legally competent evidence (or insufficient evidence of probative value) raising the issue as to whether W. H. Nichols & Company, Inc., was an employee or agent of defendant Railway. Counterpoints 7-11 inclusive argue correctness of the court's ruling with respect to plaintiffs' notice of injury and claim for compensation filed with the Industrial Accident Board as complained of in appellants' points 3 through 7. Cross-assignments of appellee complaining of the court's instruction against it and in favor of W. H. Nichols & Company will be later noticed.

Claude Baker had been a part of the Nichols grouting crew since April 1952, working as cement man; the project having progressed westward to the August location where he sustained fatal injuries. The crew numbered some fourteen men, machine operators, cement and point men, foreman for each machine; and as already stated, the operation consisted of pumping a cement mixture into water pockets, crevices and cracks that might exist in the roadbed.

In support of points 1, 2 and 3, appellant summarizes the testimony of Wm. J. Savage, defendant's Assistant Chief Engineer, and refers to the statement of facts by numbered pages. While appellant's version of certain testimony does not exactly correspond with the record, same will be accepted as true except as challenged by appellee. Savage related that his duties consisted of maintenance of defendant's roadway and tracks; such maintenance was generally to keep the track in safe and good riding condition; elimination of soft spots; "to see that the rails are adequate, [fol. 394] and that the track is not allowed to reach condition that it would be dangerous, and not to allow it to deteriorate to the extent that it would not hold the rails in proper gauge." That Nichols Company was the only contractor doing such type of railroad maintenance in this area; the machines for grouting being available for purchase on

the open market. That it was not skilled work in so far as performance by the railroad was concerned, with sand and cement furnished by defendant. That the roadmaster determined track area to be grouted, with no specified number of perforations for grouting, transportation to the job furnished by the railroad. That under the Nichols contract the railroad inspector R. L. Slaton was authorized to stop the work if it interfered with operations of trains or was dangerous thereto, and to see that the work proceeded in accordance with the contract. The roadmaster designated and selected work locations, and had the right to require performance in a manner which suited his pleasure; the right extending to requiring more perforations if in his opinion not enough had been made. That Inspector Slaton had the right to, and actually did, instruct the Nichols crew as to amount of sand or cement they used in the grouting mixture or as to amount to be pumped under any particular portion of the roadbed, and require them to do the work correctly.

Other of plaintiff's witnesses testified to the following in effect: That during course of the Nichols job, railroad Inspector Slaton was present almost all the time; that he marked the ties between which grouting points would be inserted; corrected and instructed the mixers if portions of sand and cement were too thin or too thick, and, in case of deficiency, would tell them to correct the condition. That the crew had been told to obey and follow Slaton's instructions; he always telling them when and where the machines were to be moved; Slaton further testifying: "Q. Now, there was no particular skill about putting these points in the ground, was there? A. No sir. Q. Most of these men [fol. 395] that were working out there were uneducated laboring men, weren't they? A. Well, I wouldn't say that. Q. Well, you have been out there with them, you know that they were not men of education and skill and training, don't you? A. Well, part of them were. Q. Yes, and there is no skill required in mixing sand and cement there, is there? A. No sir."

In connection with appellant's above outline of testimony is the statement that the railroad retained the right to terminate the contract at will; challenged by defendant in

that there is no provision therein for its termination at will of appellee. Also challenged is appellant's statement with respect to grouting, that: "the work was, in the language of defendant's own chief engineer, just the ordinary maintenance of the railroad." Here defendant points out that only Savage, Assistant Chief Engineer, testified as to whether the work in question was ordinary maintenance or otherwise, and as follows: "Q. Is grouting work simply part of the regular maintenance of the track? A. Yes, I would say that it is; it is not regular maintenance work, but it is a special type maintenance. * * * Q. All right, sir. And that sort of work, grouting, is that ordinary maintenance of a railroad? A. No, sir, I would consider it rather extraordinary maintenance."

It was stipulated that the double tracks between Dallas and Fort Worth at the point where Claude Baker met his death, were used by trains engaged in interstate as well as intrastate commerce.

Underlying appellant's complaint of error with respect to her refused issue No. 12 is the postulate that either (1) the Nichols contract for grouting defendant's roadbed was on its face an attempt to evade the provisions of the Federal Employers' Liability Act and therefore void, or (2) that the work being performed was in nature of regular maintenance of roadbed, a nondelegable duty of defendant under its franchise; and constituting Nichols Company its agent [fol. 396] and Claude Baker, though nominally an employee of another, in effect an employee of the carrier.

Section 51, 45 USCA, provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of inter-

state or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Section 53 provides for recovery by "such employee" of damages, though guilty of contributory negligence, to be diminished in proportion to the negligence attributable to such employee. Section 55 reads as follows: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

The only direct testimony concerning appellee's purpose in making the contract with Nichols Company is that given by Savage, its Engineer, as follows: "Q. Now, the plaintiff in the papers filed in this court has alleged in effect that this contract was a scheme or device to get around the Federal Employers' Liability Act. Is that true, Mr. Savage? A. I would say not. Q. All right, sir, why did you contract for this work? A. Primarily because we did not have the [fol. 397] equipment nor the knowledge that is necessary to do the work. Q. All right, sir. And that sort of work, grouting, is that ordinary maintenance of a railroad? A. No, sir. I would consider it rather extraordinary maintenance." There is no evidence that the work of grouting is of a recurring nature or that it had theretofore been done by the railroad.

Obviously, in above state of the record, it cannot be said that the contract on its face demonstrates an evasion of the Federal Liability Act. Surely, in view of the testimony of Savage, the matter of defendant's "purpose or intent" in making the contract was not without controversy. It may be that an issue of fact could have been premised on prohibited intent or purpose, but none was requested; and "* * * Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; * * *." Rule 279, T.C.P.

It is further argued that the work being performed by Claude Baker was that of ordinary maintenance—a non-

delegable duty of defendant—giving rise to an inference that the Nichols contract is "in avoidance of Federal liability" and per se void under the Act, as in Erie R. Co. v. Margue, 23 Fed. 2d 664, where the contractor had undertaken with its own employees "to maintain the tracks, roadway, and structures of the railroad company in Ohio"; the court holding that: " * * * The maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights. It undertook to delegate that duty to a construction company, which was largely organized and controlled by its former employees. We think one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers' Liability Act." But the cited case is not controlling of the instant situation where the process of grouting is described by Savage as maintenance of a special type. More analogous in fact are the holdings in Dougall v. Spokane, P. & S. Ry. Co., 207 Fed. 2d 843, and Norman v. Spokane-Portland & Seattle [fol. 398] Ry. Co., 101 F. Supp. 350, affirmed 192 F. 2d 1020, cert. den. 342 U.S. 945, 72 S.Ct. 558, 96 L. Ed. 703.

The cases mainly relied upon by appellant in this connection (Cimorelli v. New York Cent. R. Co., 148 F. 2d 575; Pennsylvania R. Co. v. Roth, 163 F. 2d 161, cert. den. 337 U.S. 830, 68 S. Ct. 208, 92 L. Ed. 404; and Pennsylvania R. Co. v. Barlion, 172 F. 2d 710) bear principally upon their second point, i.e., of whether it was the intent of the contracting parties under the particular facts to create a relationship of independent contractor. Furthermore, even viewing the situation most favorably from the standpoint of appellant, still the fact question persists of whether the work of grouting was extraordinary maintenance, as testified by Engineer Savage, rather than ordinary; and again appellant cannot be heard to complain, no request having been made for submission of such an issue.

In point 2 appellant maintains that the evidence, considered most favorably in her behalf, at least raises a fact issue of whether the status of Nichols under the contract and its performance was that of an employee of the railroad rather than independent contractor; the latter term being defined in the charge as: " * * * any person, who, in the pursuit of a business or occupation, undertakes to do a

particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done only as to the result of his work and not as to the means or method by which it is accomplished." Also relevant in the same connection are rules of decision as announced in Cimorelli v. New York Cent. R. Co., supra (Syls. 1, 3, 5, 7): (1) "The words 'employee' and 'employed', within Federal Employers' Liability Act, must be construed in the natural sense and describe the conventional relationship of employer and employee. Federal Employers' Lia- [fol. 399] bility Act §1, 45 U.S.C.A. §51." (3) "In ascertaining when a person is employee of another although his contract of employment is not directly made with such person, each case must be decided on its peculiar facts and ordinarily no one feature of relationship is determinative." (5) "The important test of ascertaining when a person is employee of another, although his contract of employment is not directly made with such person is the control over details of the work reserved by the employer, and to what extent person doing the work is in fact independent in its performance." (7) "The fact of actual interference or exercise of control by employer is not material in determining whether a person is an independent contractor, but, if existence of right or authority to interfere or control appears, contractor cannot be independent."

Factual background of the point under discussion has already been outlined; it being contended that the control exercised by defendant's Inspector over details of the project and its performance was such as to constitute deceased Baker an employee of the railroad, the contractor occupying the status merely of agent; at least raising a fact issue. We believe the contention to be without merit, considering the terms of the contract and attendant circumstances appearing without dispute. In the first place, the contract was not terminable at will of defendant, specifying merely a given area to be grouted. Where a writing does not fix a definite time for performance, the law imputes a reasonable time. Palmer v. Katz, 210 SW 2d 451. Secondly,

this contractor was in the specialized business of grouting. Nichols' foreman hired deceased, told him when to come to work and what to do; Nichols paying the crew their wages, deducting for income taxes and social security; firing any if necessary; the railroad performing none of these functions. The contract stated that Nichols should not be subject to detailed supervision and direction of the carrier; defendant, however, being the only one familiar with its own roadbed, the contract provided that work of grouting should be done at locations as specified by Car- [fol. 400] rier's Chief Engineer or his representative. The instructions given by Inspector Slaton concerning details of the work, here emphasized by appellant, are simply referable to the contract in question and his duty to require its satisfactory performance. The *fact* of actual interference or exercise of control by the employer is not material, absent the *right* or authority to interfere or control; Cimorelli v. New York Cent. R. Co., supra. "The mere right of a person who has let out a contract, to supervise the work in such a way as to see that it is performed according to contract, does not make the employees of the contractor his employees. Simonton v. Perry (Tex.Civ.App.) 62 SW 1090; Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 SW 495, writ of error refused; American Indemnity Co. v. Dinkins (Tex.Civ.App.) 211 SW 949, writ of error refused." Security Union Ins. Co. v. McLeod (Comm. App.), 36 SW 2d 449. Nor was the presence of appellee's Inspector, with authority to see that there was no interference with operation of trains, such an assumption of control as to make of Nichols its agent or employee. Dougall v. Spokane, supra.

On the facts, appellant's leading case of Cimorelli v. New York Cent. R. Co., supra, is hardly in point. There the agreement with Duffy as independent contractor, co-called, (sic) was on a cost plus basis; the contract itself disclosing that "full control over the means and manner of performance of the contract was reserved to appellee and that there was left in the contractor no independence." Controlling of the issue at hand, in our opinion, is Chicago, Rock Island & Pacific Ry. v. Bond, 240 U.S. 449, 36 S. Ct. 403, 60 L. Ed. 735, involving, as here, instructions given by the railroad to Turner, the contractor; the U. S. Supreme

Court i ding in part: "The railroad company, therefore, did not retain the *right* to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words did not retain control not only of what should be done but how it should be done." (Emphasis ours.) (*See Footnote.)

[fol. 401] Appellant's remaining points, 3 to 7 inclusive (already quoted in substance), must be prefaced by the following facts as reflected in the four bills of exception: In addressing the jury panel on voir dire defense counsel stated that plaintiff had filed her notice and claim with the Industrial Accident Board, not advising the panel, however, of whether compensation had been allowed or denied. Thereafter plaintiff's counsel, in absence of jury, made to the court motions as follows: That defense counsel be instructed, when Mrs. Dovie Ray Baker later became a witness, that she not be interrogated relative to said claim for compensation filed with the Industrial Accident Board or amount of the award (stating grounds), the court granting the motion to the extent that counsel may not refer to any amount received by plaintiff and overruling same to the extent that inquiry could be made "into the filing of a claim with the Industrial Accident Board and the necessary elements including filing of the claim and that a final ruling was made by the Industrial Accident Board, without reference to what the ruling was." That plaintiff's counsel then moved the court to instruct the jury that the testimony in question be limited to impeachment purposes only or to show that plaintiff had made a prior inconsistent statement; the court indicating that it would probably instruct the jury

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* Footnote:

Also quite dissimilar in fact are appellants' Texas cases of Gulf Refining Co. v. Rogers, 57 SW 2d 183, and Humble Oil & Refining Co. v. Martin (Sup. Ct.), 222 SW 2d 995. There the writings, referred to as commission agency contracts, were terminable at will of the Oil Company; in both cases the Company reserving extensive right of control; in one (Rogers) even to right to discharge employees of the lessee; in the other (Martin) the contract requiring Schneider, lessee, in addition to supervision strongly suggestive of a master-servant relationship, to perform such other duties in connection with the operation of his station as may be required of him "from time to time by the Company."

to effect that the particular testimony was admissible for the purpose of showing "prior inconsistent position of the plaintiff." Defense counsel then questioned the plaintiff fully with respect to the matter, including processing of claim to final disposition, the court not later limiting the testimony to impeachment purposes. A similar motion was made to defendant's pleading of plaintiff's notice of claim, sustained to the extent that defendant's counsel was instructed not to read allegations relative to collection of compensation; and lastly, the particular exhibits (notice and claim) were permittedly taken to the jury room over plaintiff's objection. To none of above court rulings did plaintiff make or urge a motion for mistrial.

It will be noted that during course of the trial these exhibits had bearing on the issue of whether deceased [fol. 402] Baker was an employee of the railroad rather than of Nichols within meaning of the Federal Employers' Liability Act, the court rejecting plaintiff's theory of Federal coverage; and submitting the case to the jury only as a common-law action. The later taking of notice and claim into jury room was objected to by appellant, "for the reason that said exhibits at this stage of the proceedings are highly prejudicial and inflammatory and have no bearing on any issue in this case, the court having failed to submit plaintiff's theory that the deceased, Claude Baker, came under the terms and provisions of the Federal Employers' Liability Act and such claims being admissible if at all in the first place only on the question of showing that the plaintiffs had taken an inconsistent position before the Industrial Accident Board, with the position that they are now taking in this case; that to permit the jury to take these exhibits into the jury room is calculated to cause them to discuss and consider the question of whether or not plaintiff and her children have been fully compensated for this injury by having made claim to the Industrial Accident Board of the State of Texas upon the death of Claude Baker as an employee of W. H. Nichols Company, Inc."

In above connection, the jury found that defendant's engine men failed to exercise ordinary care in warning of approach of train and that such failure was a proximate cause of Claude Baker's death; likewise finding that Baker's

failure to keep a proper lookout was a proximate cause of his death; also that prior to the arrival of the train, deceased was in a place of safety, stepping therefrom into path of the train when he knew or should have known of its approach, such action being a proximate cause of death. The jury assessed damages in the total amount of $28,045.00. All other issues were answered against the party relying thereon. At time of death Claude Baker was 56 years of age.

The trial court should have withheld the exhibits in question from any consideration by the jury in their deliberations because, on refusal of plaintiff's requested issues, they had no bearing upon any of the issues raised under [fol. 403] the court's charge; the court's ruling, however, amounting to no more than harmless error. Rule 434, T.C.P. The objectionable instruments were in no wise relevant to the issues on contributory negligence found against deceased; the jury awarding substantial damages—an amount not so low as to demonstrate that the jury was motivated by prejudice, bias or other improper motives, and appellant does not so claim. In fact, from the record as a whole, there appears nothing to indicate that plaintiff suffered probable harm from admission of the exhibits or matters relevant thereto as complained of by appellant.

All points of error, upon careful study, are overruled; an affirmance of this judgment rendering unnecessary any discussion of counterpoints brought forward by appellee.

Affirmed.

/s/ Young, Associate Justice.

Delivered December 6, 1957.

[fol. 404] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 405]

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT

No. 15,298

From District Court of Dallas County.

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

JUDGMENT—December 6, 1957

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellees, Texas & Pacific Railway Company and W. H. Nichols & Company, have and recover of the appellant, Dovie Ray Baker, individually and as Administratrix of the estate of Claude Baker, and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and of Standard Accident Insurance Company, her surety upon appeal bond, all costs in this behalf incurred or expended, for which execution may issue; and that this decision be certified below for observance.

[fol. 405a] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 409]

No. 15298

IN THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT DALLAS, TEXAS

[Title omitted]

APPELLANT'S MOTION FOR REHEARING—
Filed December 20, 1957

To the Honorable Court of Civil Appeals:

Now come Dovie Ray Baker, individually and as next friend for her minor children, and Dovie Ray Baker as administratrix of the estate of Claude Baker, deceased, and file this their motion for re-hearing whereby they would respectfully show:

Points of Error on Re-Rehearing

Point Number One:

The Court erred in holding that Appellants were not entitled to a submission of their requested issues under the Federal Employers Liability Act because they failed to request an issue inquiring into the intent and purpose of the contract, since as a matter of law deceased was covered by such act. (Opinion, Pg. 12).

Point Number Two:

The Court erred in holding that Appellants were not entitled to submit their case under the Federal Employers Liability Act because "the fact question persists of whether the work of grouting was extraordinary maintenance, . . . rather than ordinary" . . . (Opinion, Pg. 13).

Point Number Three:

The Court erred in holding that the facts did not raise an issue as to whether or not W. H. Nichols & Company was an independent contractor.

[fol. 410] *Point Number Four*:

The Court erred in holding that it was not improper and harmful error to bring to the jury panel's attention the fact that Appellant had filed a Workmen's Compensation claim and prosecuted it to final disposition.

Point Number Five:

The Court erred in holding that it was not improper and harmful error for the Trial Court to permit the Notice of Injury and Claim for Compensation to be offered in evidence.

Point Number Six:

The Court erred in holding that it was not improper to permit Appellee's counsel to read portions of the pleading referring to a claim for Workmen's Compensation to the jury.

Point Number Seven:

The Court erred in holding that the error of the Trial Court in permitting the jury to take with it, during deliberations, the Notice of Injury and Claim for Compensation was "no more than harmless error" since such action constituted presumed harmful error to Appellants. (Opinion, Pg. 18).

Point Number Eight:

The Court erred in holding that it was not improper for Appellee's counsel to interrogate the Plaintiff about the Notice of Injury and Claim for Compensation.

Re-Statement of Point Number One:

The Court erred in holding that Appellants were not entitled to a submission of their requested issues under the Federal Employers Liability Act because they failed to request an issue inquiring into the intent and purpose of the contract since as a matter of law deceased was covered by such act. (Opinion, Pg. 12).

Re-Statement of Point Number Two:

The Court erred in holding that Appellants were not entitled to submit their case under the Federal Employers Liability Act because "the fact question persists of whether

[fol. 411] the work of grouting was extraordinary maintenance, . . . rather than ordinary . . . " (Opinion, Pg. 13).

Argument and Authorities

Appellant respectfully submits that the effect of the Court's ruling in the above respects will tend to destroy the usefullness (sic) and strength of the Federal Employers Liability Act. The Court has, in effect, held that a railroad may contract with so called independent contractors to discharge the duties of the railroad imposed by law.

The Federal Employers Liability Act condemns any contract whose purpose or intent shall be "to enable any common carrier to exempt itself from any liability created by this act," (45 U.S. Code, Sec. 55). This statute has the same restrictive purpose as the Carrier's Taxing Act involved in the decision in *Wabash Railroad Co.* vs. *Finnigan*, 67 Fed. Supp. 94. That act, the Court said, is "to be judged rather from the purpose that congress had in mind than from common law rules worked out for determining tort liability". To allow a circumvention of the Federal Employers' Liability Act by the means employed in this case will have no less damaging effect than the circumventions involved in the Wabash Railroad case, Supra., or in *Dispatch Shops* vs. *Railroad Retirement Board,* A.D. U.S. Appeals 374, 153 Fed. 2d 644. In each of those cases involving maintenance work, contracts specifically stated that the railroad company was to have *no control whatsoever over the details of the work being performed,* yet in each of those cases the contracts were held violative of a provision similar to the one at hand based upon the theory that such contracts were to evade, by their operation, *though not on their face,* the purposes of the act involved.

The test for determining whether the contract in this case violates the relationship of independent contractor or not is not the common law test of who has control over the details of the work. As recognized in *Cimorelli* vs. *New* [fol. 412] *York Central Railway Co.,* 148 F. 2d 575;

> "other recognized tests are the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price, the independent nature

> of the contractor's business, his employment of assistants with the right to supervise their activities, his obligation to furnish necessary tools, supplies and materials, his right to control progress of the work except as to final results, the time for which the workmen are employed, the method of payment, whether by time or job, and whether the work is part of the regular business of the employer.

Taken singly, the contract involved in this work violates all of the standards. The work is general and no price is fixed; the contractor devoted his work largely to this project; the project was intertwined with railroad personnel and activities; the railroad furnished some tools and all materials, and controlled the progress of the work; the workmen were hired for this job only; the job was paid according to the quantity of work done and the project was of a unified nature.

The Court has held with regard to one of the standards, the right to terminate the contract at will, that the law implies a reasonable time for the contract to be performed. Such is not the case. The work which was being done by Claude Baker at the time which he met his death was being done under an extension of the contract set out on Page 19, of our brief. That extension *expressly says that the contract is not limited as to a period of time.* While the law would imply a reasonable time for the performance of any work ordered by the railroad, the contract does not specify the quantity of work to be done. As it stands and upon its face there would be no legal obligation upon the part of the railroad to continue the work beyond any point that it choses. (sic) It specified an area in which grouting was to take place. It *estimated* an amount of grouting to be done. It did not call for any set amount to be done but merely said the railroad anticipated doing a certain amount. Nothing in this contract would prevent the railroad from deciding [fol. 413] that it had done all of the grouting necessary in the area at any stage of the contract. Such a contract is terminable at will.

The question of whether or not the work being done at the time was ordinary maintenance bears upon the question

of whether the contract had an implied purpose of evading the effect of the Federal Employers Liability Act. It is virtually conceded that if the maintenance is ordinary, the railroad does not have a right to delegate such maintenance to an independent contractor. Such a delegation would be condemned.

The work being done bore a direct relationship to the operation of the railroad's main line of interstate commerce and was essential to the function of the railroad. Grouting did not consist of new construction; but was the means which the railroad selected to prevent its tracks from becoming in dangerous condition. While there was an alternate method of accomplishing the same result, the railroad had elected to maintain the stability of its tracks and prevent the tracks from getting out of gage by means of grouting. This type of work has been recognized as ordinary maintenance and within legal contemplation certainly is. As was said in *Pedersen* vs. *Delaware, L. & W. Railway Co.*, 229 U.S. 146, 57 L. Ed. 1125.

> "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unit with set of rule of law in demanding that all of these instrumentalities be kept in repair."

As said in *Erie Railroad* vs. *Margue*, 23 Fed. 2d, 664,

> "The maintenance of Defendant's railroad track was essential to the exercise of its franchise rights. It undertook to delegate the duty to a construction company, which was largely organized and controlled by its former employees. We think one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers Liability Act."

As said in *Atlantic Coast Line Railroad Company* vs. *Treadway*, 120 Va. 735, 93 So. E. 560;

> " . . . the duty is nonassignable where it pertains to the operation of the completed railway line of a common carrier". Such duties are, "in their very nature duties [fol. 414] necessarily to be performed by someone by

the Defendant, to enable the latter to discharge its public service duties as a common carrier, its public employment under its franchise."

The mere fact that the Texas and Pacific Railway in this case contracted for someone to perform a portion of the maintenance work which did not require redoing frequently and which was not part of the everyday work of the railway but rather something which it would do only on occasions when the track got in bad condition does not mean that the legal interpretation of the work would be that of extraordinary maintenance. The work being done was required for the safety and stability of the tracks, and was maintenance work in the sense that it was not new construction but repair and reconditioning of existing facilities. Certainly changing of boilers on the Defendant's engines, replacing wheels on its engines or cars, major overhauls of its rolling stock and equipment, and similar types of work are not ordinary maintenance in the sense that they are not something performed every few days or weeks. These types of maintenance are no less important to the operation of the railroad than the work of sanding, oiling and greasing, however, since, if they are not performed, the railroad's equipment will become in dangerous condition. Extraordinary maintenance is not the test to be applied. The cases above make a distinction between new construction, such as bridges and new tracks, and *all* types of maintenance work. The mere fact that the maintenance work was not frequent and repetitive maintenance work has never been a distinguishing criterion.

In *Miles* vs. *Pa. Railway Co.*, 182 F. 2d 411, relied upon by the Appellant, the work which was being done consisted of servicing, tamping and raising the tracks and rails. This work was part of new construction at the time. However, the Court discusses it from the point of view that such work would have been ordinary maintenance if the construc-
[fol. 415] tion work had been completed and all duties discharged. This type of work is no different than the work involved in the present case.

Appellant again urges the Court to reconsider the effect that the Court's holding in this case will have upon the

future operation of the Federal Employers Liability Act. Conceivably, under the Court's present holding it will now be possible for a railroad to contract a way to independent contractors virtually every bit of work required except the actual operation of trains and equipment. Under the Court's present ruling it would be possible for the railroad company to write a contract for raising of tracks, straightening of tracks, reconstruction of crossings, or major overhaul and repair of its engines. Each one of which would be an evasion of the purpose of the Federal Employers Liability Act. The act cannot be given efficient, operative effect if such contracts are permitted to stand.

Re-Statement of Point Number Three:

The Court erred in holding that the facts did not raise an issue as to whether or not W. H. Nichols & Company was an independent contractor.

Argument and Authorities

This point presents the question of the relationship between Nichols & Company and Railroad, and is not controlled by the rules related by the Court referring to the right of control as between the deceased and the railroad. It is not a question of whether the T. & P. Railroad had a right to control the details of Claude Baker's work but a question of whether the railroad had a right to control the details of Nichols & Company's work. In review of this question the facts should be viewed from the point of view most favorable to Appellant, and all adverse testimony must be discarded. For example the statement by the Court that the contract was not terminable at will by the Defendant is founded slight adverse testimony. There is sub- [fol. 416] stantial evidence in the record which would make the contract terminable at will. To view the evidence from the point of view most favorable to the Appellant, the position that the contract is terminable at will must be assumed.

Moreover, the Court recites that the work being performed under the contract was specialized work. Again it is submitted that this assumes a point of view most favorable to Appellee and not to Appellant. There is substantial

evidence in the record that the work of grouting was not specialized but on the contrary required *no skilled labor* and was merely a part of the *regular maintenance of the railroad's roadbed.*

It is submitted that upon a review of each of the elements as outlined in the *Cimorelli* decision, Supra., that it will be found that the only element unfavorable to Appellant is the recitation to the contract that the railroad shall not retain a right to control the details of the work being performed. Each of the other elements, particularly if viewed most favorably to the Appellant, will indicate a contrary conclusion.

Moreover, the Court in its opinion recognizes the existence of this fact issue. In discussing Appellant's first point, the Court says:

"Furthermore, even viewing the situation most favorably from the standpoint of Appellant, still the fact question persists of whether the work of grouting was extraordinary maintenance as testified by engineer Savage, rather than ordinary." Now the question of whether or not the maintenance was ordinary or extraordinary, if a fact issue at all, is hardly an ultimate fact issue. The least that can be said of it is that it must also constitute one of the elements of the question of whether or not Nichols & Company was an independent contractor. This is one of the factors which the jury was entitled to take into consideration in passing upon [fol. 417] that very issue. In other words, if the work contracted for was ordinary maintenance, then the jury could and should find that Nichols & Company was not an independent contractor, whereas, if it was extraordinary maintenance, that would be evidence of the fact but would not establish the fact that Nichols & Company was an independent contractor.

The recitations in the contract are not controlling on the Appellants in this case on this issue. Appellant calls the Court's attention to the language in *Gulf Refining Co.* vs. *Rogers,* 57 SW 2d 183, which is a leading case not only in this state but is now gaining national recognition.

"Moreover, *Everett Rogers was not a party to the written contract between the Gulf Refining Company and*

Russell, and the *terms thereof are not conclusive against him in determining the relationship actually existing between the contracting parties. He was entitled to establish the fact showing the relationship as it actually existed at the time of the injury.*" (Emphasis ours).

Appellant submits that the Court's holding upon this issue is directly contrary to the rule announced in *Gulf Refining Company* vs. *Rogers*, Supra. and is in direct conflict with it. The effect of the Court's ruling in this case deprives the Appellant of the right to go behind the written contract and to show the manner in which the parties themselves treated the contract at the time of the injuries. It is a valuable right and rule of law which should be preserved.

Based upon a review of the evidence from the point of view most favorable to the Appellant, it is submitted that a fact issue did exist and that it was error of the Trial Court to refuse to submit such fact issue to the jury.

Re-Statement of Point Number Four:

The Court erred in holding that it was not improper and harmful error to bring to the jury panel's attention the fact that Appellant had filed a Workmen's Compensation claim and prosecuted it to final disposition.

[fol. 418] *Re-Statement of Point Number Five*:

The Court erred in holding that it was not improper and harmful error for the Trial Court to permit the Notice of Injury and Claim for Compensation to be offered in evidence.

Re-Statement of Point Number Six:

The Court erred in holding that it was not improper to permit Appellee's counsel to read portions of the pleading referring to a claim for Workmen's Compensation to the jury.

Re-Statement of Point Number Seven:

The Court erred in holding that the error of the Trial Court in permitting the jury to take with it, during deliberations, the Notice of Injury and Claim for Compensation was "no more than harmless error" since such action constituted presumed harmful error to Appellants. (Opinion, Pg. 18).

Re-Statement of Point Number Eight:

The Court erred in holding that it was not improper for Appellee's counsel to interrogate the Plaintiff about the Notice of Injury and Claim for Compensation.

Argument and Authorities

With regard to the admission in evidence of the Notice of Injury and Claim for Compensation and other evidence bearing upon the filing of a Workmen's Compensation claim by the Appellant, it is also submitted that the Court's holding is in error. These matters were admitted on the theory that they were prior inconsistent statements or "prior inconsistent position of the Plaintiff."

To constitute prior inconsistent statements these must necessarily meet the requirement to qualify under such exception the general rules of evidence. The person against whom the statements were offered must have made material statement during the course of the trial contrary to the statements made by her in the Notice of Injury and Claim for Compensation. But this is not the case. The whole [fol. 419] controversy centers around the question of the relationship between Nichols & Company and the Texas and Pacific Railroad Company. It involves legal conclusion to be drawn from certain definite facts. Upon direct and cross examination Dovie Ray Baker testified substantially in accord with the statements made by her in the Notice of Injury and Claim for Compensation. The only difference is an elaboration of the detailed facts surrounding the relationship between the two. At no time during the trial did the Plaintiff take the position that the deceased was hired by or paid by the Texas and Pacific Railroad Company but on the contrary, took the position that the relationship

between the Texas and Pacific Railroad Company and Nichols & Company was not that of independent contractor. It is submitted that there is no inconsistency in the position taken. The Trial Court even recognized that the evidence was admissible solely for the purpose of impeachment on the theory that it was a prior inconsistent statement. In order to establish its admission upon such basis, it must have been inconsistent with some statement of fact in the testimony of the Plaintiff. No such statement of fact can be pointed to by the Appellee as justification for the admission of any one of the matters referred to.

The Court in its opinion recognizes that the Trial Court is in error in admitting such testimony without an instruction limiting it to impeachment purposes. Assuming but not conceding that it might have been admitted for such purpose, the failure of the Court to give such a limiting instruction violated the rules stated by McCormick and Ray in their *Texas Law of Evidence*, Sec. 688, Pg. 532; "Under the most universal practice well established in Texas, such statement can not be used as substantive evidence of the truth of the facts stated." In this respect the admission of the evidence without such a limiting instruction was prejudicial error to the Appellant.

With respect to the act of the Trial Court in permitting the exhibits to be carried into the jury room after the Court [fol. 420] had refused a requested issue, inquiring whether or not Nichols & Company was an independent contractor, this Court has found such action to be error, but under Rule 434, Rules of Civil Procedure, says that such error amounts to no more than harmless error. Appellant submits that the Court has strayed from the rule in *Meyer* vs. *Thomas*, 186 SW 2d 811, pronounced by the Supreme Court of Texas in 1945. In Meyer vs. Thomas, an employee who had recovered compensation from the Texas State Highway Department sued a company known as Thomas and Ratliff in a compensation recoupment suit. He alleged that he had been involved in an automobile accident and that the driver of the other truck was an employee of Thomas and Ratliff and his supervisor was an employee of Thomas and Ratliff. The Highway Department intervened for approximately $7900.00 compensation paid by them. Because of the ar-

rangements between the driver of the other truck, and Thomas and Ratliff, the question of whether he was an employee or independent contractor was sharply in controversy. On the trial of the case the Trial Court permitted the introduction in evidence of information regarding the Workmen's Compensation claim by, and settlement to, the Plaintiff. In that case the jury found damages in the amount of $10,000.00 in behalf of the Plaintiff which was a substantial amount, found some issues of liability in favor of the Plaintiff, found that the collision was the result of an unavoidable accident and of a new and independent cause or causes. Based upon this verdict favorable to the Defendant the Trial Court entered judgment for the Defendant just as in the case at bar. There was no showing in Meyers vs. Thomas that the introduction in evidence of matters concerning the Workmen's Compensation claim and settlement had caused any harm or prejudice to the Plaintiff other than the implied harm and prejudice of which further reference will be made. The Court of Civil Appeals held, contrary to the opinion in *Johnson* vs. *Willoughby,* 183 SW 2d 201, that such was not error and anyway prejudicial. [fol. 421] On this point we invite the Court's attention to the statement in the opinion of the Supreme Court at page 813 SW 2d as follows:

> "In determining whether the action of the Trial Court in the present case in admitting the testimony objected to by the state was prejudicial we are persuaded by the fact that *any testimony which is immaterial and tends to decloud the issues and confuse and mislead the jury is prejudicial in its effect.*" And further, "for the same reason it is error to refer to the fact that the Plaintiff is protected by some form of insurance. It is improper in either case because such fact is irrelevant and immaterial and *is calculated to work injury*". (Emphasis ours).

The prejudice and harm is pinpointed by the quoted portion of the Supreme Court of Idaho from *Leaback* vs. *Nelson,* 62 Idaho 96, 107 Pac. 2d 1054 at Pg. 74 of the original brief where the Court says: *"It might prejudice*

the Plaintiff's case by the thought that the employee already been compensated." (Emphasis ours).

Appellant submits that this error falls within the exceptions to the harmless error rule where harm and prejudice are presumed. Certainly no other effect can be given to the holding in Johnson vs. Willoughby, Supra., and Meyer vs. Thomas, Supra. If that is the case the mere fact that the jury in the present case found liability issues against the Plaintiff and found a substantial amount of damages does not prevent harm and prejudice from arising. The holding of the Court in this case is in direct conflict with Meyer vs. Thomas for which reason Appellant respectfully requests the Court to withdraw its original opinion and to correct the error committed.

Conclusion

For the foregoing reasons Appellant respectfully requests that this Motion for Rehearing be granted and that judgment of the Trial Court be reversed and the cause remanded for new trial.

/s/ Ken R. Davey, Of: Caldwell, Baker and Jordan, 305 Medical Arts Building, Dallas, Texas, Attorneys for Appellants.

[fol. 422] Proof of service (omitted in printing).

[fol. 423] [File endorsement omitted]

[fol. 424]

IN THE COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—
January 17, 1958

This day came on to be heard the motion of appellant for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

[fol. 425]

"In the Supreme Court of Texas

No. A-6718

From Dallas County Fifth District.

Dovie Ray Baker, et al.,

v.

Texas & Pacific Ry. Co.,

Order Refusing Application for Writ of Error—
April 30, 1958

"This day came on to be heard application of petitioners for a writ of error to the Court of Civil Appeals for the Fifth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicants, Dovie Ray Baker, individually and as Administratrix of the estate of Claude Baker, deceased, and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and their surety, Standard Accident Insurance Company, pay all costs incurred on this application."

[fol. 426] Clerk's Certificate to foregoing papers (omitted in printing).

[fol. 428]

IN THE SUPREME COURT OF TEXAS

Civil No. .....

DOVIE RAY BAKER, et al., Petitioners,

v.

TEXAS & PACIFIC RAILWAY COMPANY, Respondent.

PETITIONERS' MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR

To the Honorable Supreme Court of Texas:

Come now Petitioners and move the Court to grant rehearing upon their Application for Writ of Error and upon rehearing to grant such application, and would show:

Points of Error on Rehearing

Point One

The judgment of the Court of Civil Appeals erroneously holds that Petitioners were not entitled to an affirmative submission of their case under the Federal Employers Liability Act, because Petitioners' decedant (sic) was within the scope of such Act and Petitioners' action was therefore under it.

Point Two

The judgment of the Court of Civil Appeals incorrectly interprets the Federal Employers Liability Act (45 U.S.C. Sect. 51-5) as excluding deceased therefrom, because he was engaged in the work of an interstate carrier in furtherance of interstate commerce, and such judgment, therefore, deprived Petitioners of their rights under the Act.

Point Three

The judgment of the Court of Civil Appeals incorrectly holds as a matter of law that Deceased was not within the

[fol. 429] scope of the Federal Employers Liability Act. (45 U.S.C. Sect. 51-5) because the contract between Deceased's employer and the railroad had the effect of and was intended to permit the railroad to evade liability under Federal Law.

Point Four

The judgment of the Court of Civil Appeals incorrectly holds that Petitioners, as a predicate to recovery under the Federal Employers Liability Act, (45 U.S.C. Sect. 51-5) were required to request an issue inquiring whether or not the Defendant railroad entered into the contract with deceased's employer with "the intent or purpose of evading liability under the Federal Act" because, under the facts, Petitioners' decedant (sic) and Petitioners were entitled to the protection of such act.

Point Five

The judgment of the Court of Civil Appeals incorrectly holds that Petitioners, as a predicate to recovery under the Federal Employers Liability Act, (45 U.S.C. Sect. 51-5) were required to request an issue inquiring whether the maintenance work deceased was doing was ordinary or extraordinary, because such inquiry is not ultimate or controlling under the Federal Employers Liability Act and the effect of the judgment therefore is to incorrectly limit the scope of that Act.

Point Six

The judgment of the Court of Civil Appeals erroneously holds that there is *no* evidence that deceased's employer, W. H. Nichols & Company was not an independent contractor, because there was some evidence, and the refusal of the trial court to submit Petitioners' requested Issue No. 1 or No. 12 therefore deprived them of their rights under the Federal Employers Liability Act. (45 U.S.C. Sect. 51-5).

Point Seven

The Court of Civil Appeals incorrectly held that it was not error for the trial court to permit Respondent's counsel,

[fol. 430] over timely objection, to inform the jury panel that Petitioners had filed and processed to completion a claim for workmen's compensation.

Point Eight

The Court of Civil Appeals erred in holding that it was proper for the Trial Court to permit Respondent's counsel to read to the jury, over Petitioners' objection, Paragraph IX of their answer relating to Petitioners' filing of Notice of Injury and Claim for Compensation.

Point Nine

The Court of Civil Appeals erred in holding that it was proper for the Trial Court to permit Respondent's counsel to offer in evidence, over Petitioners' objection, the Notice of Injury and Claim for Compensation filed by Petitioners.

Point Ten

The Court of Civil Appeals erred in holding that it was proper for the Trial Court to permit Respondent's counsel to interrogate Dovie Ray Baker regarding the Notice of Injury and Claim for Compensation.

Point Eleven

The Court of Civil Appeals erred in holding that the error of the Trial Court in permitting the jury to take with them, during deliberations, the Notice of Injury and Claim for Compensation, after refusal of Petitioners' affirmative theory that Deceased was covered by the Federal Employers Liability Act at the time of his death, was only harmless error.

Points of Error on Rehearing
(Restated)

Point of Error Number One
(Restated)

The judgment of the Court of Civil Appeals erroneously holds that Petitioners were not entitled to an affirmative

submission of their case under the Federal Employers Liability Act, because Petitioner's decedent was within the scopt (sic) of such Act and Petitioners' action was therefore under it.

[fol. 431] *Point of Error Number Two*
(Restated)

The judgment of the Court of Civil Appeals incorrectly interprets the Federal Employers Liability Act (45 U.S.C. Sect. 51-5) as excluding deceased therefrom, because he was engaged in the work of an interstate carrier in furtherance of interstate commerce, and such judgment, therefore, deprived Petitioners of their rights under the Act.

Point of Error Number Three
(Restated)

The judgment of the Court of Civil Appeals incorrectly holds as a matter of law that Deceased was not within the scope of the Federal Employers Liability Act. (45 U.S.C. Sect. 51-5) because the contract between Deceased's employer and the railroad had the effect of and was intended to permit the railroad to evade liability under Federal Law.

Point of Error Number Four
(Restated)

The judgment of the Court of Civil Appeals incorrectly holds that Petitioners, as a predicate to recovery under the Federal Employers Liability Act, (45 U.S.C. Sect. 51-5) were required to request an issue inquiring whether or not the Defendant railroad entered into the contract with deceased's employer with "the intent or purpose of evading liability under the Federal Act" because, under the facts, Petitioners' decedant (sic) and Petitioners were entitled to the protection of such act.

Point of Error Number Five
(Restated)

The judgment of the Court of Civil Appeals incorrectly holds that Petitioners, as a predicate to recovery under the

Federal Employers Liability Act, (45 U.S.C. Sect. 51-5) were required to request an issue inquiring whether the maintenance work deceased was doing was ordinary or extraordinary, because such inquiry is not ultimate or controlling under the Federal Employers Liability Act and the effect of the judgment therefore is to incorrectly limit the scope of that Act.

[fol. 432] Statement

The determination of Petitioners' Points One through Five as set out above involve an interpretation of the Federal Employers Liability Act as to its essential scope and coverage. These points can not be determined, notwithstanding what has been said by the Court below, without the effect of directly interpreting that Act. In this regard, the essential questions involved must be viewed from the purposes and intent of that Act and no technicalities of State procedure or practice should be allowed to thwart the basic rights created thereunder. The rights of litigants under the Federal Employers Liability Act do not depend upon narrow constructions of the Special Issue practice of this state.

Petitioners take the position that the holding of the Court of Civil Appeals is based largely upon such procedural matters, and, in view of the opinion of the Supreme Court of the United States in *H. T. Arnold* vs. *Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 1 L. Ed. (2d) 889, 77 S. Ct. 840, such procedural matters should not control the outcome of this case.

The statement under Points of Error Nos. One, Two and Three of the Application for Writ of Error sets forth substantially the basis upon which Petitioners asserted rights under the Federal Employers Liability Act. Assuming these facts to be true, which for purposes of this examination must be done, the case boils down to this proposition: Is an employee of a contractor working in track maintenance upon the interstate right-of-way of a railroad company within the Federal Employers Liability Act where his employer has entered into a contract with the railroad to perform an indefinite amount of work, with its materials, under its guidance, for a price based on quantity of work, and where the contract incorporates provisions of insurance

and indemnity against the potential liability of the railroad company under the Federal Law?

[fol. 433] This question is answered in the negative by the Court of Civil Appeals because of two things: (1) Petitioners did not request an issue as to whether or not it was the intent of the railroad to evade its liability, and, (2) Petitioners did not request an issue whether the maintenance work deceased was performing was ordinary or extraordinary, the former, concededly, being a part of the nondelegable duty of the railroad, and itself sufficient to bring the deceased under the Federal Employers Liability Act. Petitioners again urge that these so-called fact issues have no place in the decision.

The particular elements looked to as forming the demonstrable intent or purpose of the railroad to evade its liability are as present here as in the controlling Federal decisions which Petitioners have cited in their application. *Cimorelli* vs. *N. Y. Central Railway Co.*, 148 Fed. 575, (C.C.A. 6th): *Erie RR Co.* vs. *Marque,* 23 Fed. (2) 664; *Miles* vs. *Penn. RR Co.,* 182 Fed. (2) 411. In none of those decisions has the matter turned upon the submission of an issue on intent and purpose to the jury.

But Respondent asserts that notwithstanding all else, the Act does not extent (sic) to Petitioners' decedent, because, in the conventional sense, he was not an employee of the railroad. This argument is based upon a fundamental falacy. (sic) In the cases cited by Appellant, Cimorelli, Miles, and Margue were not, in the conventional sense, employees of the Railroad Company. It is in this respect that the opinion of the Court below curtails the scope of the Act. It is not a question of whether Baker was an employee of the railroad that is controlling. The controlling question is whether Nichols & Company was an independent Contractor and Whether the railroad was enabling itself to evade Federal Liability (under any Act—Carriers Taxing Act, F.E.L.A., Safety Appliance, etc.) for, if the contract between Nichols and the Railroad had such an effect, then the purpose of accomplishing this result appears. The mere fact of so contracting is sufficient evidence of intent and purpose. In any [fol. 434] event, the conduct of the parties may show such purpose and intent.

The whole point of Petitioners' argument, that the work of Baker was necessary maintenance of the right-of-way and therefore non-delegable, is to show that the railroad sought to escape its duty and responsibility. The cases cited by Respondent, *Dougall* vs. *Spokane, P. & S. Ry. Co.*, 207 F. (2d) 843, and other cases cited at Page 8 of Respondent's brief do not involve that type of activity especially related to the safety of interstate movements.

Further distinction appears since in the *Dougall* case, Supra., the work was (1) *extensive* and here *restricted*, (2) the railroad *could not get equipment* and here *it was available*. (3) the *contractor had specially trained crews* and here *hired as unskilled workers*, and (4) there more feasible and economical for the railroad to hire the work done, and here no showing of either.

Respondent attacks vigorously the authorities cited by Petitioners, relative to the Carriers' Taxing Act, Railroad Retirement Act and Railroad Insurance Act, saying these cases have no bearing here. That is fine only if we overlook the fact that each of these acts imposes Federal duties or responsibilities upon Respondent. It is these that it seeks to evade. It can not be said that cases holding the very type contract here involved to be attempts to evade liability under Federal law are not authority for the proposition that this contract evades liability under Federal Law. These are the controlling Federal decisions under which Petitioners are entitled to their day in court.

Based upon these holdings it is established that Petitioners' decedant (sic) was covered by the Federal Employers' Liability Act because: (1) he was working on and for the railroad, (2) in the furtherance of Interstate Commerce (3) upon ordinary and necessary maintenance work of the railroad (4) for the employer who was not an independent contractor because under a contract which per- [fol. 435] mitted the Railroad to evade its responsibilities, (5) and was one of indemnity. Upon the facts of this case Petitioners were entitled to rely upon the Federal Employers Liability Act and failure to submit the case under that act was error.

There is no question that, if this was error, it was reversible error.

For these reasons Petitioners urge the Court to reconsider on reharing, (sic) the refusal to grant a writ of error, and to grant such writ and the relief prayed for therein.

Point of Error Number Six
(Restated)

The judgment of the Court of Civil Appeals erroneously holds that there is *no* evidence that deceased's employer, W. H. Nichols & Company was not an independent contractor, because there was some evidence, and the refusal of the trial court to submit Petitioners' Requested Issue No. 1 or No. 13, therefore deprived them of their rights under the Federal Employers Liability Act. (45 U.S.C. Sect. 51-5).

Statement

In considering whether or not a fact question was raised testing whether or not W. H. Nichols & Company, Baker's employer, was an independent contractor, it must be borne in mind that the trial court summarily refused to submit this issue and thereby held that there was *no* evidence of probative force that Nichols & Company acted as an agent of the railroad. Overlooking its own holding upon Petitioners' first three Points, the Court of Civil Appeals here agrees there was none. Yet upon the first three Points, it discusses the law from the point of view that such a fact question did exist.

For it can not be argued that, if less than conclusive, the contract itself, the evasive character of it, and the fact that the work was maintenance, whether ordinary or otherwise, are the most compelling evidence upon this Point. Respondents own authorities bear this out. In the control-
[fol. 436] ling Federal cases cited by Respondent the Court held:

Dougall vs. *Spokane, F. & S. Ry. Co.*, 207 Fed. 2d 843. There was evidence to support the Trial Court's findings on the very issues we have requested, (the Trial Court found the contractor independent).

Norman vs. *Spokane, P. & S. Ry. Co.*, 101 F.S. 300, 192 Fed. 2d 1020, upon the same point. The Norman case was

submitted to the Judge upon agreed facts including the stipulation that the contract (sic) was (1) a truly independent contractor, (2) under a contract which was not designed to evade the F.E.L.A.

Chicago, R.I. & P. Ry. Co. vs. *Bond*, 36 Sup. Ct. 403, 60 L. Ed., 735, 240 U.S. 449, was not in point because the deceased *was the contractor* and bound himself by the terms in the contracts, was decided before the amendment of the F.E.L.A., and involved coaling operations.

Cimorelli vs. *N.Y. C. Ry. Co.*, 148 Fed. 2d 575 was decided favorably to Petitioners as a matter of law.

Del Veechio vs. *Penn. Ry. Co.* 233 Fed. 2d 2, did not involve maintenance work, or work of the Railroad but rather the unloading of coal at a pier.

The other cases cited by respondent are State Court cases and have little bearing upon this point. The cases cited by Petitioner stand unchallenged.

Latsko vs. *National Carloading Corp.*, 192 Fed. 2 905 held specifically that a fact issue was presented.

Miles vs. *Penn. Ry. Co.* 158 Fed. 2d 336 (1st appeal) was reversed upon closely similar facts for trial of *the fact issue of whether the injured party's employer was or was not an independent contractor.*

Halley vs. *Ohio Valley Electric Co.* 114 S.W. 572, *Downs* vs. *B & O Ry. Co.*, 102 NE 2d 537, *Benjamin* vs. *Penn. Ry. Co.* 112 N.Y. S(2) 824; are all State Court F.E.L.A. cases holding that a fact question existed.

[fol. 437] Neither Respondent not (sic) the Court below has cited one authority that holds to the contrary of the position taken by Petitioners. Under all of the facts an issue of fact was presented and the failure of the Court to submit it deprived Petitioners of the affirmative submission of their theory of the case. Until this issue is tried to a jury Petitioners have not enjoyed their day in Court and have been deprived of their rights under pertinent Federal Legislation.

The Court of Civil Appeals held that this case was controlled by *Dougall* vs. *Spokane, etc.*, Supra, and *Norman* vs.

Spokane, etc., Supra. If this is so, it should have reversed and remanded the cause. The Dougall case was tried to the Court without a jury upon the very fact issues requested by Petitioners and refused here. The Norman case was tried to the Court upon stipulated facts including the stipulation that the contractor *was* an independent contractor. Petitioners here and now ask the Court to follow these authorities and permit them to try their issues of fact. Petitioners do not stipulate that Nichols & Co. was an independent contractor, but assert that it was not, and was an agent, servant or employee of the railroad. The trial of this fact issue is essential to the cause of action asserted by them. In this case the issue of whether or not Nichols & Co. was an independent contractor was the most hotly contested issue in the case. There was evidence that the railroad controlled details of the work, directed the employees, supervised the operation (and evidence to the contrary). There was evidence that the contract did not call for a definite time nor amount of work, that it was a type of cost-plus contract or piece work contracts, that the Railroad furnished most of the material, could have bought the machines and done the work itself. The work was maintenance, necessary to its operation, and saved the railroad money in wages. Upon all of these facts this case is much stronger than either the Dougall or Norman cases above. If a fact issue existed in the Dougall case, why doesn't one exist here?

[fol. 438] Petitioners, therefore, strongly urge the Court to carefully review Respondent's leading cases, to follow the well established Federal law, and to reconsider, upon rehearing, its refusal to grant a writ of error and to grant such writ and the relief prayed for therein.

Point of Error Number Eight
(Restated)

The Court of Civil Appeals erred in holding that it was proper for the Trial Court to permit Respondent's counsel to read to the jury, over Petitioners' objection, Paragraph IX of their answer relating to Petitioners' filing of Notice of Injury and Claim for Compensation.

Point of Error Number Nine
(Restated)

The Court of Civil Appeals erred in holding that it was proper for the Trial Court to permit Respondent's counsel to offer in evidence, over Petitioners' objection, the Notice of Injury and Claim for Compensation filed by Petitioners.

Point of Error Number Ten
(Restated)

The Court of Civil Appeals erred in holding that it was proper for the Trial Court to permit Respondent's counsel to interrogate Dovie Ray Baker regarding the Notice of Injury and Claim for Compensation.

Point of Error Number Eleven
(Restated)

The Court of Civil Appeals erred in holding that the error of the Trial Court in permitting the jury to take with them, during deliberations, the Notice of Injury and Claim for Compensation, after refusal of Petitioners' affirmative theory that Deceased was covered by the Federal Employers Liability Act at the time of his death, was only harmless error.

Statement

Petitioners so strongly believe that a reversal is required under the preceding point that they would here merely call [fol. 439] the Court's attention to the above points in their application for Writ of Error. Upon retrial of this cause the rules of evidence should be passed on to the Trial Court so that error does not occur in this respect again. Petitioners do not feel, upon the authorities cited that the evidence admitted constituted prior inconsistent statements and ask this Court to so hold, upon rehearing, so that no error will occur in its subsequent admission.

Conclusion

For the reasons stated Petitioners respectfully pray the Court to grant rehearing, and upon rehearing to grant the

Writ of Error and subsequently the relief prayed for therein.

Respectfully submitted,

/s/ Ken R. Davey, Of: Caldwell, Baker and Jordan, 305 Medical Arts Building, Dallas 1, Texas, Attorneys for Petitioners.

[fol. 440]

IN THE SUPREME COURT OF TEXAS

ORDER OVERRULING APPLICATION FOR REHEARING —June 18, 1958

"This day came on to be heard petitioners' motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled."

[fol. 441] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 442]

SUPREME COURT OF THE UNITED STATES

No. 363—October Term, 1958

DOVIE RAY BAKER, et al., Petitioners,

v.

TEXAS AND PACIFIC RAILWAY CO.

ORDER ALLOWING CERTIORARI—November 10, 1958

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District, is granted and case transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 15 1958
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER *et al.*, *Petitioners*

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas

HARVEY L. DAVIS,
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3315 Daniels,
Dallas 5, Texas.

CALDWELL, BAKER & JORDAN
and KEN R. DAVEY,
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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. .....

DOVIE RAY BAKER *et al.*, *Petitioners*

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Court of Civil Appeals for the 5th Supreme Judicial District of Texas

---

Petitioners, Dovie Ray Baker, individually and as administratrix of the estate of Claude Baker and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, pray that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the 5th Supreme Judicial District of Texas entered in the above entitled case on December 6, 1957.

I. Citation to Opinion Below

The opinion of the Court of Civil Appeals, printed in Appendix "A" hereto, pp. 25-47, is not officially reported

but is printed in 309 S.W. 2d 508. The Supreme Court of Texas wrote no opinion in refusing Petitioners' application for a writ of error.

II. Jurisdiction

The judgment of the Court of Civil Appeals was entered on December 6, 1957. Appendix "A" hereto, pages 47, 48. The order denying Petitioner's motion for rehearing by said Court of Civil Appeals was rendered and entered on January 17, 1958, Appendix "A" hereto, page 48. Petitioners' application for writ of error to the Supreme Court of Texas, timely filed, was refused, no reversible error on April 30, 1958, Appendix "A" hereto, page 49. The order denying Petitioners' motion for a rehearing of their application for writ of error by the Texas Supreme Court was rendered and entered on June 18, 1958, Appendix "A" hereto, page 50. The Court of Civil Appeals thus became in this case the highest court of the state in which a decision could be had. *Panhandle Eastern Pipe Line Company v. Calvert*, 347 U.S. 157, 98 L ed 583, 74 S Ct 396 (1954).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) because Petitioners' cause of action is under the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C., Sections 51 et seq., and because a right and privilege is specially set up and claimed under said act and under the Constitution of the United States,

and because the Court of Civil Appeals has decided questions of substance under that Act not heretofore determined by this Court and decided in a way probably not in accord with the applicable decisions of this Court.

III. Questions Presented

Petitioners are the widow and minor children of Claude Baker, who was killed when struck by Respondent's train on the 20th day of August, 1952, while in the regular course of his employment with W. H. Nichols & Co. as a member of a crew doing a type of maintenance work for Respondent called "grouting" along the Respondent's main line double tracks. It is stipulated that the main line double tracks are used in the movement of freight and passenger trains in interstate commerce. Respondent's east and west-bound trains were passing each other at the time Baker was struck and the jury found that the negligence of Respondent's enginemen on the east-bound train which struck Baker was a proximate cause of Baker's death; that Baker's own negligence was a proximate cause of his death; and that Petitioners' damages totaled $28,045.00. None of these findings have been questioned on appeal. Substantial evidence was introduced that W. H. Nichols & Co. was not an independent contractor. The trial court, refusing to permit Petitioners to present their case to the jury under the Federal Employers Liability Act (hereinafter called FELA), but applying state law, entered judgment for Respondent that Petitioners take nothing by their suit, which

judgment was affirmed by the Texas appellate courts. The questions presented are:

1. Whether the Texas courts have the power to deny Petitioners a jury trial to determine their federal rights under FELA when substantial evidence was introduced that the employer of the deceased, Claude Baker, doing maintenance work on Respondent's main line railroad bed, was not an independent contractor but a mere agent of Respondent.

2. Whether Respondent had the power to exempt itself from liability to Petitioners under FELA by attempting to delegate to the employer of Claude Baker some of its duties imposed by law to maintain its main line roadbed carrying interstate commerce.

3. Whether Claude Baker was an employee of Respondent within the meaning of FELA because he was doing the work of Respondent closely and substantially affecting, and in the furtherance of, interstate commerce.

IV. Constitutional Provision and Statutes Involved

1. The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States.

2. The statutory provisions involved are Sections 1 and 5 of the Federal Employers Liability Act, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sections 51 and 55, and paragraphs (3), (4) and (21) of Section 1 of the Interstate Commerce Act, 41 Stat. 474, 49 U.S.C., Sections 1 (3), (4) and (21). They are printed in Appendix "B" hereto (pp. 51-55).

V. Statement

("Tr" herein refers to the Transcript. "SF" refers to the Statement of Facts which is a separate document under Texas appellate practice.)

1. Material Facts

Claude Baker had been hired by W. H. Nichols & Co. (hereinafter called Nichols) and received his wage payments from Nichols. (SF 26.) After Baker was killed Petitioners filed a claim for workmen's compensation benefits and received a lump sum settlement from the compensation carrier for Nichols (SF 194-196). However, when Petitioners' counsel became aware of the nature of Baker's duties and of the contract between Nichols and Respondent, Petitioners' complaint and petition against Respondent originally based on a common law action for negligence, was amended to set forth a claim based on FELA (SF 202, 203, 211, 212). The basis of Petitioners' claim under FELA was that the contract between Respondent and Nichols provided that Nichols was to do certain maintenance and repair work on Respondent's railway tracts used in interstate commerce; and that although the contract specified that Nichols was an independent contractor, the arrangement was in truth and in fact made to evade the provisions of FELA since Respondent had the right to control the details and the manner in which Nichols performed such maintenance work; and that at the time Baker was killed he was performing work for Respondent in the furtherance of interstate commerce and was performing work so closely and substantially affecting interstate commerce as to en-

title Petitioners to the benefit of the Federal Employers Liability Act and as to bring Baker within its terms and provisions. (Tr 4-7).

Evidence introduced to support Petitioners' claim under FELA include the contract and the extension of the contract between Respondent and Nichols. (Printed in the opinion of the Court of Civil Appeals. Appendix "A" hereto, pp. 26-29.) It provided for Nichols to furnish labor, equipment and water for grouting the roadbed of Respondent's double track main line at certain locations as specified by Respondent to the satisfaction of Respondent's chief engineer or his duly authorized representative. Sections 4 and 5 of the contract provided that Nichols indemnify Respondent for any and all liability arising from the contract or work performed under it.

Evidence was introduced that Respondent's assistant chief engineer's principal duties were to supervise the railroad division employees working on the maintenance of the roadbed and tracks and to make appropriations to the various divisions of the railroad for the upkeep of the tracks and structures (SF 163); that grouting work was for the purpose of sustaining, stabilizing and strengthening the roadbed by filling cracks and crevices with a cement mix (SF 13, 14, 170) and is a method of putting the mix into the embankment to fill the voids and force out the water from water pockets that form in the roadbed embankment (SF 170), the locations of which were laid out in the engineering department of Respondent (SF 332,

333); that maintenance of the roadbed and tracks is principally a matter of keeping the tracks in a safe and good riding condition (SF 165) that low spots make the roadbed unsafe and interfere with the operation of high-speed trains and their elimination is a necessary part of the maintenance of the roadbed (SF 166); that grouting is one type of maintenance work done to preserve the roadbed in good condition. Respondent's assistant chief engineer first agreed that grouting work is simply part of the regular maintenance of the track; later he called it a special type of maintenance (SF 175) and still later he said he "would consider it rather extraordinary maintenance." (SF 371.)

Although by Section 3 of the contract between Respondent and Nichols it is declared that Nichols "shall occupy the status of an independent contractor and shall not be subject to the detailed supervision and direction of the carrier (Respondent) but responsible to carrier only for the final results in the accomplishment of such work or services," Section 1 provided that Nichols was to grout roadbed at locations as specified by Respondent's chief engineer. Voluminous testimony by numerous members of the grouting crew may be summarized to show that in actuality they had been told by Nichols' foreman to obey the orders of Respondent's inspector, Slaton, who was on the job all the time while the crew was working. (SF 34, 70-75, 80, 84, 94, 102, 107); that the men obeyed Slaton (SF 34, 84); that Respondent's inspector Slaton would tell the crew members to thicken or thin the grout being used by

adding more sand, cement or water (SF 32, 84, 93, 94, 102, 121); that no one but Slaton marked off the places in the roadbed where the points were to be driven into the ground so that the grout mixture could be pumped therein; that the selection of such places was left solely up to Slaton (SF 32, 33, 83-85, 93, 102); that neither the pointman of the crew nor anyone else except Slaton had anything to do with the selection of the places where the points would be driven in the ground (SF 84, 85, 102) and that Slaton would tell the men when and where to move to a new location after the grouting was finished at an old location (SF 31, 84). A primary duty of Slaton was to prevent the grouting under pressure from humping or throwing the tracks out of cross level by seeing that the men did not pump too much mixture in the embankment (SF 376, 377). Also to put out slow flags to let the trainmen know the grouting crew was at work and to see that the grouting work did not interfere with the operation of the trains (SF 176).

Even cross-examination by Respondent's own counsel brought out certain facts raising a question about Nichols' status as an independent contractor, in that Slaton would tell a crew member to move a grouting point from the ground when the mixture bubbled out due to the inattentiveness of a crew member (SF 88) and one crew member when asked whether he worked for the T & P Railroad answered: "I don't know whether I was or not. I might—I might have been working for both. It was all I knew. I just—I was on the T & P railroad work." (SF 118.)

Respondent's assistant chief engineer admitted that if Respondent's roadmaster had decided after a period of time that all the grouting work needed had been done he had the right under the contract to terminate the work and that the area to be grouted was up to the railroad, as well as the number of feet to be worked (SF 179-a, 372); that the contract did not cover any specific amount of money but that was left open to be determined from time to time (SF 373) and that the contract could be canceled by Respondent at any time (SF 375). Evidence was also furnished by Respondent's assistant chief engineer that Respondent at any time (SF 375).

Evidence was also furnished by Respondent's assistant chief engineer that Respondent furnished the sand and cement used in the grouting mixture (SF 172) and that the contract provided that Respondent was to transport Nichols' men and equipment by railroad to and from the site of the work without charge; that Respondent could do the grouting work itself if it had the equipment; that the equipment used was a hydraulic pump that forced the grouting materital into the railroad embankment under pressure; that such pumps are in common use in construction work and are available for purchase by Respondent (SF 172); that there was no skill required of grouting crew members in mixing the sand and cement and putting the points in the ground (SF 341); that the crew members were laboring men and rather uneducated (SF 381). Claude Baker's job was handling cement (SF 12) and he did farming and raised cotton in addition to his grouting work (SF 10, 11).

2. How Federal Questions Were Presented in the State Courts

Before the case was submitted to the jury, Petitioners asked the trial court to submit their specially requested issue No. 1 and later their specially requested issue No. 13. These specially requested issues were substantially identical and No. 13 reads as follows:

> "Do you find from a preponderance of the evidence that at the time Claude Baker, deceased, sustained his fatal injuries, W. H. Nichols & Company, Inc., did not bear the relationship to Texas & Pacific Railway Company of an independent contractor, as that term has been defined herein for you.
>
> "Answer 'It was not an independent contractor' or 'it was an independent contractor'.
>
> "Answer . . . . . .
>
> " 'An independent contractor' as used in the above Special Issue is meant any person, who, in the pursuit of a business or occasion undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done, only as to the result of this work, and not as to the means or method by which it is accomplished."

The Petitioners also requested the court to submit to the jury their specially requested issue No. 12 reading as follows:

> "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude

Baker, deceased, and what attributable to Defendant, Texas & Pacific Railway Company?

"Answer: Attributable to Claude Baker, deceased per cent.

"Answer: Attributable to the Texas & Pacific Railway Company per cent."

But the court refused to submit to the jury any of the said specially requested issues. (Tr. 90-95.)

On appeal to the Texas Court of Civil Appeals the following points were preserved and argued to the said court:

> "**First Point**—The Court erred in failing to submit Plaintiff's Specially Requested Issue No. 12, inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue. (Germane to Assignment of Error No. 15, Tr, p. 78)."

> "**Second Point**—The evidence was sufficient to raise the question of whether or not W. H. Nichols & Company, Inc. was an independent contractor, and therefore, the Court erred in failing to submit either Plaintiffs' Specially Requested Issue No. 1 or No. 13, inquiring as to such fact, which issue was raised by Plaintiffs' pleadings. (Germane to Assignments of Error Nos. 11 and 16, Tr, pp. 76-78.)"

After the trial court's judgment was affirmed by the Court of Civil Appeals and Plaintiffs' motion for rehearing was overruled by the said court, Plaintiffs then applied

for a writ of error to the Supreme Court of Texas, urging the following points:

"**Point of Error Number One.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their Requested Issue No. 12 under the Federal Employers Liability Act (45 U.S.C., Sect. 51) because the Deceased, Claude Baker, was within the scope and coverage of that Act, and therefore Petitioners were deprived of their affirmative theory of the case. (Germane to Assignment of Error No. 15, and Points of Error Nos. 1 and 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Two.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to affirmative submission of their case under the Federal Employers Liability Act (45 U.S.C., Section 51) because they failed to request an issue inquiring into the intent and purpose of the contract between Deceased's employer and the Texas & Pacific Railway Company. (Germane to Point of Error No. 1, in Petitioners' motion for Rehearing.)

"**Point of Error Number Three.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their affirmative theory of the case under the Federal Employers Liability Act (U.S.C., Sect. 51) because of their failure to request an issue inquiring whether the maintenance work that Deceased was performing at the time of his death was ordinary or extraordinary maintenance. (Germane to Point of Error No. 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Four.** The Court of Civil Appeals erred in holding that there was no evidence that W. H. Nichols & Company, the Deceased's employer, was not acting as an independent contractor

at the time Deceased met his death. (Germane to Point of Error No. 3 in Petitioners' Motion for Rehearing.)"

The Supreme Court refused Petitioners' application for writ of error and Petitioners filed a motion for rehearing which again brought to the attention of the Supreme Court of Texas the points brought forth in Petitioners' application for writ of error. The Supreme Court of Texas subsequently overruled Petitioners' motion for rehearing on their application for writ of error.

VI. Reasons for Granting the Writ

1. The Writ should be Granted because Petitioners were denied a jury trial on the issues raised under FELA.

The judgment of the Court of Civil Appeals and the refusal of the Supreme Court of Texas to grant a writ of error, if allowed to stand, will deprive Petitioners of their constitutional rights and their rights under FELA to a trial by jury. The jury was not permitted to pass on the question of whether Nichols was an independent contractor or merely an agent of Respondent. If Nichols was merely an agent of Respondent then the deceased employee, Baker, came under the protection and within the benefits of FELA. The Seventh Amendment to the Constitution provides that the right of trial by jury shall be preserved. And the jury is "part and parcel of the remedy for railroad workers under the Employers Liability Act." *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 354, 87 L ed 1444, 1448 63 S Ct 1115 1119 (1943). A mere reading of the statement hereof clearly demonstrates that the evidence

raised the issue of whether Baker's employer, Nichols, was or was not an independent contractor, therefore it should have gone to the jury. *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523, 100 L ed 668, 76 S Ct 608 (1956). Indeed, the evidence is comparable in strength to the evidence in cases where it has been held as a matter of law that the nominal employer of the injured worker was not an independent contractor. *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949); *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N.E. 2d 537, 30 ALR 2d 503 (1951).

However, the first and main point that Petitioners desire to present is that the issue before the trial court and Texas Court of Civil Appeals was whether there was any evidence and reasonable inferences in the record by which the jury could find that Nichols was not an independent contractor; that despite all of the evidence introduced which would enable a jury to reasonably find that Nichols was not an independent contractor, the trial court refused to let the jury pass on such issue and the trial court's refusal has been affirmed. The result is that Petitioners were effectively prevented from presenting their case under FELA to the jury.

If this judgment is allowed to stand, Claude Baker and workers like Baker doing the railroad's work and exposed to the dangers of such work, are deprived of a jury trial to determine whether they come under the provisions of FELA. If allowed to stand this judgment is an invitation to railroads to relieve themselves of many of their obligations under FELA by doing their maintenance work

through so-called independent contractors. The judgment allows form to triumph over substance. These results are not within the intent of Congress in enacting Sections 51 and 55 of FELA as amended, and this Court has not permitted such results to stand. *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326, 2 L ed 2d 799, 78 S Ct 758 (1958). *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, L ed 2d 493, 77 S Ct 443 (1957).

The refusal of the trial court to tender to the jury Petitioners' specially requested issues effectively deprived Petitioners of a jury trial on their affirmative theories under FELA but the opinion of the Court of Civil Appeals neither clearly states nor properly analyzes this fundamental problem. No authority cited by it is on the point in question and no authority has been found that supports its judgment. Its opinion does not apply the established federal rule that in passing on whether there is sufficient evidence to submit the issue to the jury it should look only to the evidence and reasonable inferences which support Petitioners' case. *Wilkerson v. McCarthy*, 336 U.S. 53, 57, 93 L ed 497, 502, 69 S Ct 413 (1949). Its opinion does not recognize the duty of the court under FELA to see that Petitioners' asserted federal rights governed by federal law are fully protected as the Congress intended them to be. *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 1 L ed 889, 77 S Ct 840 (1957). Instead the opinion clutches at straws to reach the erroneous conclusion that the trial court was correct in its denial to Petitioners of a jury trial on FELA issues.

Without going into a detailed analysis of that part of the opinion dealing with the issue in question, it is pointed out that the opinion looks principally to evidence deemed favorable to Respondent and draws only inferences favorable to Respondent. By these means it reaches the untenable conclusion that there was no evidence for the jury to pass on. Its reasoning is that although Respondent did have and did exercise actual control of Nichols' employees concerning the details of their work, Respondent did not have the "right" to such control. Appendix "A" hereto, pp. 42, 43.

Cimorelli v. New York Central Ry. Co., 148 F. 2d 575 (C.C.A. 9th 1945) is cited to support this conclusion. But the *Cimorelli* case, strongly analogous on its facts to instant case is flatly contra to the Court of Civil Appeals' decision on the issue in question. In the *Cimorelli* case the trial court held as a matter of law that the Duffy Construction Co. was an independent contractor but this holding was reversed on appeal. In instant case the trial court held as a matter of law that Nichols was an independent contractor and the Court of Civil Appeals affirmed that decision. In the *Cimorelli* case Duffy loaded and unloaded the carrier's cars under a contract with the carrier providing that Duffy was an independent contractor. But the Circuit Court of Appeals reasoned that because of the very nature of the work its performance could not be committed exclusively to the discretion of Duffy, that necessarily the carrier had the right to control and therefore the contractor (Duffy) could not be independent. The facts in the instant case support this reasoning. And they also support

the reasoning of the Circuit Court of Appeals at page 579 in the *Cimorelli* case that the carrier could not discharge its obligations if it had delegated to Duffy the exclusive right to do the work without supervision as to when, where and how the work was to be done.

It is submitted that the more reasonable conclusion in instant case and one that a jury might well make if it had an opportunity is that actual control of the details of the work of Nichols' employees by Respondent indicate that Respondent had the right and authority to exercise such control. "Fairminded men might reach different conclusions—" *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353, 87 L ed 1444, 1447, 63 S Ct 1115, 1118 (1943). Certainly the Court of Civil Appeals' conclusion cannot be valid under the rules of his honorable Court, because the duty and obligation of the trial court and of the Court of Civil Appeals was to consider the evidence and all reasonable implications arising therefrom, even though they may be conflicting, to determine if the fact issue was raised for the jury's decision as to whether Nichols was or was not an independent contractor. *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 100 L ed 668, 76 S Ct 608 (1956).

The admitted fact that Respondent did exercise control and give directions to Nichols' employees concerning the details of their work was substantial evidence in itself that Respondent had the right and authority, as well as the power, to exercise such control and give such directions. A jury could find from this admitted fact alone that Nichols was really an agent of Respondent and was not an

independent contractor. Also, whether Respondent had the "right" to control Nichols, was a question of fact for the jury to consider. It was one of the very elements included in the definition of independent contractor which Petitioners requested the trial court to present to the jury but which request was refused. (Page 10, *supra.*) The Court of Civil Appeals was clearly wrong in treating this as a question of law for it to decide.

Furthermore, the opinion is so inconsistent that it refutes itself. It denied Petitioners a jury trial by holding there was no evidence from which the jury could answer Petitioners' specially requested issue that Nichols was not an independent contractor. Yet it also holds that the evidence did not establish that Baker was covered by FELA as a matter of law on the basis that there was sufficient evidence favorable to Respondent to raise fact issue which should have gone to the jury on (1) the intent and purpose of Respondent and Nichols in making the contract, and (2) whether the maintenance work of grouting was "regular" maintenance work. It then held that Petitioners waived their right to have these two issues presented to the jury because Petitioners did not request them. (See pp. 37-40, Appendix "A" hereto.)

There can be little, if any, doubt that these two issues are evidentiary issues to be considered in deciding the ultimate issue as to whether Nichols was an independent contractor. See *Atlantic Coast Line R. Co. v. Treadway*, 120 Va. 735, 93 S.E. 560 (1917), cert. den., 245 U.S. 670, 62 L ed 540,

38 S Ct 191 (1918). The jury could have, in determining whether Nichols was an independent contractor, given consideration to the evidence of the intent and purpose of the contract between Respondent and Nichols such as the reason for its indemnity clause or why Respondent could cancel it at will. Likewise the jury could have, in determining whether Nichols was an independent contractor, considered evidence of the nature of the maintenance work done by Nichols. If they found that the maintenance work was an essential part of Respondent's operational duties imposed by law they could have concluded that Nichols necessarily could not be an independent contractor. If they considered it some extraordinary type of maintenance work that could be delegated to an independent contractor then it would be some evidence that Nichols was in fact an independent contractor

Inevitably then if the Court of Civil Appeals' opinion is correct in holding that there was evidence to raise these two evidentiary issues it is incorrect in holding that there was no evidence to raise the ultimate issue of Nichols' status as a contractor. Its denial of a jury trial to Petitioners was clearly incorrect. This case is an excellent example of the lower court failing to respect the jury function in passing on disputed facts and in drawing inferences from proven facts. Therefore this Honorable Court should exercise its discretion to grant this writ. *Wilkerson v. McCarthey*, 336 U.S. 70, 71, 93 L ed 497, 507 (1949).

2. The Writ should be granted because the effect of the decision of the Court of Civil Appeals is to permit Respondent to exempt itself from its liabilities under FELA by a contract in violation of Sec. 55 of FELA.

The law imposes upon Respondent the non-delegable duty to maintain its railroad facilities including of course its tracks and roadbed, Section 1(3), (4) and (21) of the Interstate Commerce Act, 49 U.S.C. Section 1(3), (4) and (21). *Pederson v. Delaware, L & W Ry. Co.*, 229 U.S. 146, 57 L ed 1125, 33 S Ct 648 (1913); *Erie Railroad Co. v. Margue*, 23 Fed. 2d 664; *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735, 93 So. E. 560 (1917), cert. den., 245 U.S. 670, 62 L ed 540, 38 S Ct 191 (1918). But Respondent has attempted to exempt itself from any liabilities by having a certain type of its non-delegable maintenance work done by Nichols under a contract labeling Nichols an independent contractor and providing that Nichols shall fully indemnify Respondent for any liability arising from the performance of the work. Therefore the contract is void under Section 55 of FELA.

The opinion attempts to avoid the effect of the non-delegable nature of the maintenance work done by indicating that "extraordinary" maintenance work is delegable but "regular" maintenance work is not. But the use of adjectives can not change the fact that the work was one method selected by Respondent to maintain its tracks in a condition required of it by law. The record does not reflect what other methods could have been used. Regardless of the adjectives applied, it was maintenance work essential to the proper and safe function of the railroad and bore a

direct relationship to the operation of the Respondent's main lines in interstate commerce.

The opinion also attempts to avoid the intent "or" purpose of the contract by relying on the opinion of Respondent's assistant chief engineer that the contract was not a scheme or device to get around FELA. Instead it should have applied the rule long ago laid down by this Court in *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U.S. 603, 613, 56 L ed 911, 916, 32 S Ct 589 (1912) that the words "purpose or interest" do not refer simply to an actual intent to circumvent the statute.

> "The 'purpose or intent' of the contract and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

Petitioners urge this Honorable Court to consider the possible effect this opinion will have upon the future operation of FELA, at least in Texas. Under this opinion it is possible for a carrier to contract for "independent contractors" to do all of its required work except the actual operation of trains. This case is a prime example where certiorari should be granted "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri P. R. Co.*, 352 U.S. 500, 507, 1 L ed 493, 501, 77 S Ct 443 (1957).

3. The Writ should be granted so that this Honorable Court may consider the important question of whether workers in the position of Claude Baker should be classified employees of carriers within the meaning of FELA.

Baker was, and many workers like him, are doing the carrier's work such as this maintenance work. Their duties are in the furtherance of interstate commerce or their duties directly or closely and substantially affect such commerce. Sec. 51 of FELA. Though by legal form they technically are employees of an "independent contractor" the actual, practical fact is that they are railroad workers giving their labor to the furtherance of the carrier's enterprise and daily exposed to the risks inherent in railroad work. They should be classified as employees of the carrier within the meaning of FELA because they fit the definition of such employees and all the reasons exist for including them under the broad purpose of FELA.

Sinkler v. Missouri P. R. Co., 356 U.S. 326, 2 L ed 2d 799, 78 S Ct (1958) dealt with the scope of the meaning of the word "agent" in FELA. Here we are concerned with the scope of the meaning of the word "employee". Petitioners urge that all the reasons expressed in the *Sinkler* case are also present for giving an accommodating scope to the word "employees" to give vitality to the standard governing the liability of carriers to workers injured while doing the carrier's work. And there is the added fact that the negligence here is that of the Respondent rather than its agent.

In the present case Respondent, rather than doing the necessary maintenance work itself, arranged with Nichols to supply the crew and equipment to perform this work on its behalf. There is no question that this work was done to further the task of Respondent's enterprise; and for purposes of FELA, Baker and the other crew members were as much a part of Respondent's total enterprise as was Respondent's inspector Slaton or its other regular maintenance employees. Even if Nichols was an independent contractor and was really free of detailed supervision of its operations by Respondent, this would be irrelevant, because at the time Baker was killed Nichols' crew members were engaged in furthering the operational activities of Respondent.

Conclusion

The judgment and opinion of the Court of Civil Appeals deprive Petitioners, and those similarly situated, of the right to trial by jury; deprive them of the protection of FELA and allow Respondent to avoid its liabilities under FELA. The opinion is in the teeth of Section 55. For all of the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

HARVEY L. DAVIS,

CALDWELL, BAKER & JORDAN
and KEN R. DAVEY,
Counsel for Petitioners.

APPENDIX A

OPINION, JUDGMENTS AND ORDERS OF COURTS BELOW:

Dovie Ray BAKER et al., Appellants,

v.

TEXAS & PACIFIC RY. CO., Appellee.

No. 15298.

Court of Civil Appeals of Texas.
Dallas.

Dec. 6, 1957.

YOUNG, Justice.

The suit is prosecuted by appellant as administratrix of the Estate of Claude Baker, deceased husband, also as next friend of their three minor children, claiming liability against appellee Railroad Company for his death which occurred August 20, 1952. From a jury trial and finding of contributory negligence on part of said Claude Baker, a defendant's judgment resulted, and this appeal; the trial court rejecting plaintiff's assertion of rights pursuant to 45 U.S.C.A. § 51 et seq., Federal Employers's Liability Act. Defendant Railroad had made W. H. Nichols & Company, Inc., a party hereto, and has appealed from the trial court's adverse ruling on its crossaction for indemnity against Nichols Company in event of liability to plaintiffs; details of which phase of the litigation will later appear.

On April 1, 1952 the Railroad and Nichols Company had entered into a written contract for grouting work between specified mile posts (pumping of sand and cement into roadbed under pressure for strengthening and stabilization). The Nichols Company was engaged in performance of this contract and Claude Baker, deceased, was on the job as one of its employees when struck by defendant's eastbound train. This contract is therefore quoted in full, together with supplement thereto of later date:

> "This Agreement, executed in duplicate April 1, 1952 by and between The Texas and Pacific Railway Company, herein called Carrier, first party, and W. H. Nichols & Company, Inc., Dallas, Texas, herein called Contractor, second party; Witnesseth
>
> "For and in consideration of the keeping by each of the parties hereto of the several covenants and agreements hereinafter set forth, it is hereby mutually agreed as follows:
>
> "1. Contractor shall within thirty (30) days after the execution of this contract begin and diligently prosecute the work described herein until completed in a first class and workmanlike manner and to the satisfaction of the Carrier's Chief Engineer or his duly authorized representative. The work to be done by the Contractor shall consist of:
>
> "Furnishing labor, equipment and water for grouting roadbed on Carrier's double track main line at locations between Mile Post 215, near Dallas, and Mile Post 230, near Arlington, Texas, as specified by Carrier's Chief Engineer or his representative. Area to be grouted consists of a total or approximately 42,040 track feet.
>
> "2. For the faithful performance of the work by the Contractor, The Carrier shall make and Contractor

shall accept payment at prices or rates as follows: $0.10 per linear track foot of roadbed grouted, plus $0.30 per cubic foot of sand pumped into roadbed measured dry. Payment hereunder is to be made promptly upon completion and acceptance of the work, if completed within 30 days; otherwise payment shall be made at the end of each 30 days as the work progresses. Contractor, if called upon, shall furnish Carrier written evidence that he has paid in full all amounts that may be due by him to any and all persons who may perform labor or furnish material or supplies in connection with said work; and in the event he fails to furnish satisfactory written evidence thereof carrier may withhold payment pending receipt of such written evidence.

"As one of the considerations hereof Carrier, insofar as it lawfully may do so shall transport free to the site of the work and, after completion of the work therefrom not exceeding an equal distance, via solely the line of Railway of Carrier, Contractor, Officers, men, teams and equipment actually engaged on or in connection with the work, but excluding fuel, supplies and explosives; and all such transportation shall be at Contractor's risk in case of accident or damage.

"3. In the performance of any of the work or services herein provided, or any part thereof, Contractor shall occupy the status of an independent contractor, and shall not be subject to the detailed supervision and direction of Carrier, but responsible to Carrier only for the final results in the accomplishment of such work or services.

"4. Contractor shall and does hereby assume full responsibility for and agrees to defend, indemnify and hold the Carrier harmless from any and all liability, damage and expense which the Carrier may incur or suffer by reason of (a) any breach by Contract of any of the covenants herein contained, (b) injury to or death of any persons, or loss, damage or destruction

of or delay to any property, arising out of, resulting from or incident to the performance or nonperformance of any of the services and obligations herein assumed by Contractor and (c) transportation of persons and property by Carrier in conformity with paragraph 2 hereof.

"5. Contractor assumes any and all liability and agrees to indemnify Carrier against any and all taxes, contributions and comparable payments imposed by or arising under any municipal, State or Federal law, order or regulation upon or incident to the payment by Contractor of wages, compensation or other forms of remuneration to persons in his employ, performing the services provided for herein, or any part thereof. * * *"

(Supplement)

"December 2, 1952
File: 330-2

"W. H. Nichols & Company, Inc.
3015 Grand Avenue
Dallas 10, Texas

Gentlemen:

"Please refer to our contract dated April 1, 1952, covering grouting of roadbed between our Mile Post 215, near Dallas, and Mile Post 230, near Arlington, unit prices covered by this contract being 10¢ per lineal foot of roadbed grouted plus 30¢ per cubic foot of sand pumped into roadbed, measured dry.

"The above mentioned contract, while not limited as to period of time, is limited as to location of work. We wish to continue this work during the year 1953, working to vicinity of Mile Post 244, just east of Fort Worth. Preliminary survey indicates that we will wish to grout approximately 20,000 lineal feet in addition to that covered by present contract, although it may develop more grouting than this is desired as we proceed with the work.

"If you are agreeable to doing this grouting work as indicated under the same terms as provided in contract dated April 1, 1952, please so indicate by accepting in space provided below and returning original of this letter to me for our record. Yours very truly, (Signed) R. J. Gammie, Chief Engineer. Accepted: W. H. Nichols & Company, Inc. By (Signed) W. E. Nichols, W. E. Nichols Title: President."

Above contract was entered into as a result of appellee having advertised for bids, receiving one other bid from a Fort Worth concern.

Appellants predicate their claim to benefits under the Federal Employers' Liability Act on the following allegations of petition on which they went to trial: "IV. That on or about the 1st day of April, 1952, Defendant, The Texas & Pacific Railway Company, entered into contracts and agreements with W. H. Nichols & Company, Inc. whereby the said W. H. Nichols & Company, Inc. was to perform certain maintenance and repair work on Defendant's roadbed in Dallas County, Texas; *that said work was a part of the regular maintenance and upkeep of Defendant's line of railway track then in use in interstate commerce* and said contract, while purporting to constitute W. H. Nichols & Company, Inc., an independent contractor, *was in truth and in fact an effort and attempt to evade the provisions of the Federal Employers' Liability Act;* that Defendant, Texas & Pacific Railway Company, at all times mentioned in this petition, had the right to control the details and the manner, means and method by which W. H. Nichols & Company, Inc. performed said work." (Emphasis ours.)

Primary points of appeal center on the trial court's re-

fusal to submit plaintiff's issues, 1, 12 and 13. Issues 1 and 13 being similar in form, No. 1 only is quoted along with No. 12: (1) "Do you find from a preponderance of the evidence that with reference to the work W. H. Nichols & Company, Inc. was performing at the time Claude Baker, deceased, was killed, W. H. Nichols & Company, Inc., was not an independent contractor?" (followed by definition of "independent contractor"). Issue 12: "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude Baker, deceased, and that attributable to defendant, Texas & Pacific Railway Company? Answer: Attributable to Claude Baker, deceased, ... per cent. Answer: Attributable to The Texas & Pacific Railway Company, ... per cent."

Original petition of Dovie Ray Baker was in form of an action at common law, suing individually and as next friend of the minor children of herself and husband; in first amended original petition asserting coverage of the Federal Employers' Liability Act; in October 1955, qualifying as administratrix, and in third amended original petition of September 1956, suing as "personal representative" of deceased as required by sec. 53, Title 45 U.S.C.A.; and alternatively as at common law.

This is a second trial of the case. Prior to any suit, however, but following the death of Claude Baker, appellant wife had filed her notice of fatal injury and claim for workman's compensation benefits with the Industrial Accident Board of Texas; both instruments reciting that the employer of deceased was W. H. Nichols & Company, Inc.

Employers Mutual Liability Insurance Company of Wisconsin, compensation carrier, in due course recognized liability and made a lump sum settlement on account of the death of Claude Baker, paying workmen's compensation benefits in the sum of $7,919.94. It was developed from witnesses for plaintiff at the trial that Claude Baker had been hired by Nichols' foreman, who told the crew when to come to work and what to do; when to quit and when the machines were to be moved; that they were paid for their work by Nichols who deducted for their income taxes and social security; that defendant Railway paid them no money, made no deductions from salaries, never told them when to report for work or to quit work; deceased telling his wife that he was employed by W. H. Nichols & Company.

Points of appeal may be summarized in part: The trial court's error (1) in failing to submit plaintiffs' requested issue No. 12, "inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers' Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue"; (2) in failing to submit issue No. 1 or No. 13, the evidence being sufficient to raise the question of whether or not W. H. Nichols & Company ,Inc., was an independent contractor; (3) in overruling plaintiffs'

objection to a statement made by defense counsel while interrogating the jury panel as a whole "that Plaintiff had filed a claim for workmen's compensation benefits alleging that Claude Baker was an employee of W. H. Nichols & Company, Inc., and had processed that claim to final disposition before the Industrial Accident Board, and in overruling Plaintiffs' motion to instruct the jury not to consider such statement"; (4) in admitting in evidence the notice of injury and claim for compensation "filed by Plaintiffs with the Industrial Accident Board alleging that Claude Baker was an employee of W. H. Nichols & Company, Inc., which were offered by Defendant, and in failing to instruct the jury, as requested by Plaintiffs, that such evidence was admissible for impeachment purposes only"; (5) in permitting counsel for defendant to read to the jury over plaintiff's objection "paragraph 9 of the third amended original answer, wherein reference was made to claim for compensation Plaintiffs had filed with the Industrial Accident Board based upon the assertion that Claude Baker was an employee of W. H. Nichols & Company, Inc"; (6) in failing to grant "Plaintiffs' motion to withdraw from the consideration of the jury notice of injury and claim for compensation filed with the Industrial Accident Board by Plaintiffs, alleging Claude Baker was an employee of W. H. Nichols & Company, Inc., because such evidence, if admissible at all, was admissible for impeachment purposes only, and the court having failed to submit Plaintiffs' theory that Claude Baker was covered by the provisions of the Federal Employers' Liability Act

as an employee of Defendant, such exhibits were not relevant to any issue to be decided by the jury and were highly prejudicial and inflammatory"; (7) in overruling plaintiffs' motion "made prior to the time Plaintiff Dovie Ray Baker took the witness stand, to instruct counsel for Defendant not to interrogate her concerning the Notice of Injury and Claim for Compensation filed by Plaintiffs with the Industrial Accident Board based upon the assertion that Claude Baker was an employee of W. H. Nichols & Company, Inc., and that said claim had been processed to final disposition."

Counterpoints of defendant should be noted in this connection: That the trial court *did not err:* (1, 2) in failing to hold that, as a matter of law, the evidence established that Claude Baker was covered by the provisions of the Federal Employers' Liability Act because there was no evidence (or insufficient evidence of probative force) "that Appellee entered into the contract with W. H. Nichols & Company, Inc. for the purpose or with the intent of evading the provisions of the Federal Employers' Liability Act"; (3, 4) in failing to hold that, as a matter of law, the evidence established that Claude Baker was covered by the provisions of the Federal Employers' Liability Act because there was no evidence (or insufficient evidence of probative value) that the work in question was regular railroad maintenance; (5, 6) in failing to submit plaintiffs' requested issues 1 or 13 because there was no legally competent evidence (or insufficient evidence of probative value) raising the issue as to whether W. H. Nichols & Company,

Inc., was an employee or agent of defendant Railway. Counterpoints 7-11 inclusive argue correctness of the court's ruling with respect to plaintiffs' notice of injury and claim for compensation filed with the Industrial Accident Board as complained of in appellants' points 3 through 7. Cross-assignments of appellee complaining of the court's instruction against it and in favor of W. H. Nichols & Company will be later noticed.

Claude Baker had been a part of the Nichols grouting crew since April 1952, working as cement man; the project having progressed westward to the August location where he sustained fatal injuries. The crew numbered some fourteen men, machine operators, cement and point men, foreman for each machine; and as already stated, the operation consisted of pumping a cement mixture into water pockets, crevices and cracks that might exist in the roadbed.

In support of points 1, 2 and 3, appellant summarizes the testimony of Wm. J. Savage, defendant's Assistant Chief Engineer, and refers to the statement of facts by numbered pages. While appellant's version of certain testimony does not exactly correspond with the record, same will be accepted as true except as challenged by appellee. Savage related that his duties consisted of maintenance of defendant's roadway and tracks; such maintenance was generally to keep the track in safe and good riding condition; elimination of soft spots; "to see that the rails are adequate, and that the track is not allowed to reach condi-

tion that it would be dangerous, and not to allow it to deteriorate to the extent that it would not hold the rails in proper gauge." That Nichols Company was the only contractor doing such type of railroad maintenance in this area; the machines for grouting being available for purchase on the open market. That it was not skilled work in so far as performance by the railroad was concerned, with sand and cement furnished by defendant. That the roadmaster determined track area to be grouted, with no specified number of perforations for grouting, transportation to the job furnished by the railroad. That under the Nichols contract the railroad inspector R. L Slaton was authorized to stop the work if it interfered with operations of trains or was dangerous thereto, and to see that the work proceeded in accordance with the contract. The roadmaster designated and selected work location, and had the right to require performance in a manner which suited his pleasure; the right extending to requiring more perforations if in his opinion not enough had been made. That Inspector Slaton had the right to, and actually did, instruct the Nichols crew as to amount of sand or cement they used in the grouting mixture or as to amount to be pumped under any particular portion of the roadbed, and require them to do the work correctly.

Other of plaintiff's witnesses testified to the following in effect: That during course of the Nichols job, railroad Inspector Slaton was present almost all the time; that he marked the ties between which grouting points would be

inserted; corrected and instructed the mixers if portions of sand and cement were too thin or too thick, and, in case of deficiency, would tell them to correct the condition. That the crew had been told to obey and follow Slaton's instructions; he always telling them when and where the machines were to be moved; Slaton further testifying:

> "Q. Now, there was no particular skill about putting these points in the ground, was there? A. No, sir.
>
> "Q. Most of these men that were working out there were uneducated laboring men, weren't they? A. Well, I wouldn't say that.
>
> "Q. Well, you have been out there with them, you know that they were not men of education and skill and training, don't you? A. Well, part of them were.
>
> "Q. Yes, and there is no skill required in mixing sand and cement there, is there? A. No, sir."

In connection with appellant's above outline of testimony is the statement that the railroad retained the right to terminate the contract at will; challenged by defendant in that there is no provision therein for its termination at will of appellee. Also challenged is appellant's statement with respect to grouting, that: "the work was, in the language of defendant's own chief engineer, just the ordinary maintenance of the railroad." Here defendant points out that only Savage, Assistant Chief Engineer, testified as to whether the work in question was ordinary maintenance or otherwise, and as follows: "Q. Is grouting work simply part of the regular maintenance of the track? A. Yes, I would say that it is; it is not regular maintenance work, but it is a special type maintenance. * * * Q. All right, sir.

And that sort of work, grouting, is that ordinary maintenance of a railroad? A. No, sir, I would consider it rather extraordinary maintenance."

It was stipulated that the double tracks between Dallas and Fort Worth at the point where Claude Baker met his death, were used by trains engaged in interstate as well as intrastate commerce.

[1] Underlying appellant's complaint of error with respect to her refused issue No. 12 is the postulate that either (1) the Nichols contract for grouting defendant's roadbed was on its face an attempt to evade the provisions of the Federal Employers' Liability Act and therefore void, or (2) that the work being performed was in nature of regular maintenance of roadbed, a non-delegable duty of defendant under its franchise; and constituting Nichols Company its agent and Claude Baker, through nominally an employee of another, in effect an employee of the carrier.

Section 51, 45 U.S.C.A., provides: "Every common carrier by railroad while engaging in commerce between any of the several States of Territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves,

or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Section 53 provides for recovery by "such employee" by damages, though guilty of contributory negligence, to be diminished in proportion to the negligence attributable to such employee. Section 55 reads as follows: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: * * *."

The only direct testimony concerning appellee's purpose in making the contract with Nichols Company is that given by Savage, its Engineer, as follows:

> "Q. Now, the plaintiff in the papers filed in this court has alleged in effect that this contract was a scheme or device to get around the Federal Employers' Liability Act. Is that true, Mr. Savage? A. I would say not.
>
> "Q. All right, sir, why did you contract for this work. A. Primarily because we did not have the equipment nor the knowledge that is necessary to do the work.
>
> "Q. All right, sir. And that sort of work, grouting, is that ordinary maintenance of a railroad? A. No, sir.

> I would consider it rather extraordinary maintenance."

There is no evidence that the work of grouting is of a recurring nature or that it had theretofore been done by the railroad.

Obviously, the above state of the record, it cannot be said that the contract on its face demonstrates an evasion of the Federal Employers' Liability Act. Surely, in view of the testimony of Savage, the matter of defendant's "purpose or intent" in making the contract was not without controversy. It may be that an issue of fact could have been premised on prohibited intent or purpose, but none was requested; and "* * * Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; * * *." Rule 279, Texas Rules of Civil Procedure.

It is further argued that the work being performed by Claude Baker was that of ordinary maintenance—a non-delegable duty of defendant—giving rise to an inference that the Nichols contract is "in avoidance of Federal liability" and per se void under the Act, as in Erie R. Co. v. Margue, 6 Cir., 23 F. 2d 664, where the contractor had undertaken with its own employees "to maintain the tracks, roadway, and structures of the railroad company in Ohio"; the court holding that: "* * * The maintenance of defendant's railroad tracks was essential to the exercise of its franchise rights. It undertook to delegate that duty to a construction company, which was largely organized and

controlled by its former employees. We think one of the purposes of its contract with the construction company was to avoid the liabilities of the Federal Employers' Liability Act." But the cited case is not controlling of the instant situation where the process of grouting is described by Savage as maintenance of a special type. More analogous in fact are the holdings in Dougall v. Spokane, P. & S. Ry. Co., 9 Cir., 207 F.2d 843, and Norman v. Spokane-Portland & Seattle Ry. Co., D.C., 101 F. Supp. 350, affirmed 9 Cir., 192 F.2d 1020, certiorari denied 342 U. S. 945, 72 S.Ct. 558, 96 L.Ed. 703.

The case mainly relied upon by appellant in this connection (Cimorelli v. New York Cent. R. Co., 6 Cir., 148 F.2d 575; Pennsylvania R. Co. v. Roth, 6 Cir., 163 F.2d 161, certiorari denied 337 U.S. 830, 68 S.Ct. 208, 92 L.Ed. 404; and Pennsylvania R. Co. v. Barlion, 6 Cir., 172 F.2d 710) bear principally upon their second point, i e., of whether it was the intent of the contracting parties under the particular facts to create a relationship of independent contractor. Furthermore, even viewing the situation most favorably from the standpoint of appellant, still the fact question persists of whether the work of grouting was extraordinary maintenance, as testified by Engineer Savage, rather than ordinary; and again appellant cannot be heard to complain, no request having been made for submission of such an issue.

[2] In point 2 appellant maintains that the evidence, considered most favorably in her behalf, at least raises a fact issue of whether the status of Nichols under the con-

tract and its performance was that of an employee of the railroad rather than independent contractor; the latter term being defined in the charge as: "* * * any person, who, in the pursuit of a business or occupation, undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done only as to the result of his work and not as to the means or method by which it is accomplished." Also relevant in the same connection are rules of decision as announced in Cimorelli v. New York Cent. R. Co., supra (Syls. 1, 3, 5, 7): (1) "The words 'employee' and 'employed', within Federal Employers' Liability Act, must be construed in the natural sense and describe the conventional relationship of employer and employee. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51." (3) "In ascertaining when a person is employed of another although his contract of employment is not directly made with such person, each case must be decided on its peculiar facts and ordinarily no one feature of relationship is determinative." (5) "The important test of ascertaining when a person is employee of another, although his contract of employment is not directly made with such person is the control over details of the work reserved by the employer, and to what extent person doing the work is in fact independent in its performance." (7) "The fact of actual interference or exercise of control by employer is not material in determining

whether a person is an independent contractor, but, if existence of right or authority to interfere or control appears, contractor cannot be independent."

[3] Factual background of the point under discussion has already been outlined; it being contended that the control exercised by defendant's Inspector over details of the project and its performance was such as to constitute deceased Baker an employee of the railroad, the contractor occupying the status merely of agent; at least raising a fact issue. We believe the contention to be without merit, considering the terms of the contract and attendant circumstances appearing without dispute. In the first place, the contract was not terminable at will of defendant, specifying merely a given area to be grouted. Where a writing does not fix a definite time for performance, the law imputes a reasonable time. Palmer v. Katz, Tex.Civ.App., 210 S. W. 2d 451. Secondly, this contractor was in the specialized business of grouting. Nichols' foreman hired deceased, told him when to come to work and what to; Nichols paying the crew their wages, deducting for income taxes and social security; firing any if necessary; the railroad performing none of these functions. The contract stated that Nichols should not be subject to detailed supervision and direction of the carrier; defendant, however, being the only one familiar with its own roadbed, the contract provided that work of grouting should be done at locations as specified by Carrier's Chief Engineer or his representative. The instructions given by Inspector Slaton concerning details of the work, here emphasized by

appellant, are simply referable to the contract in question and his duty to require its satisfactory performance. The *fact* of actual interference or exercise of control by the employer is not material, absent the *right* or authority to interfere or control; Cimorelli v. New York Cent. R. Co., supra. "The mere right of a person who has let out a contract, to supervise the work in such a way as to see that it is performed according to contract, does not make the employees of the contractor his employees. Simonton v. Perry, Tex.Civ.App., 62 S.W. 1090; Smith v. Humphreyville, 47 Tex.Civ App. 140, 104 S.W. 495 writ of error refused; American Indemnity Co. v. Dinkins. Tex.Civ.App., 211 S.W. 949, writ of error refused." Security Union Ins. Co. v. McLeod, Tex.Com.App., 36 S.W. 2d 449, 451. Nor was the presence of appellee's Inspector, with authority to see that there was no interference with operation of trains, such an assumption of control as to make of Nichols its agent or employee. Dougall v. Spokane, supra.

On the facts, appellant's leading case of Cimorelli v. New York Cent. R. Co., supra, is hardly in point. There the agreement with Duffy as independent contractor, so-called, was on a cost plus basis; the contract itself disclosing that "full control over the means and manner of performance of the contract was reversed to appellee and that there was left in the contractor no independence." Controlling of the issue at hand, in our opinion, is Chicago, Rock Island & Pacific Ry. v. Bond, 240 U.S. 449, 36 S.Ct. 403, 406, 60 L.Ed. 735, involving, as here, instructions given by the railroad to Turner, the contractor; the U. S. Supreme

Court holding in part: "The railroad company, therefore, did not retain the *right* to direct the manner in which the business should be done, as well as the results to be accomplished, or, in other words, did not retain control not only of what should be done, but how it should be done." (Emphasis ours.)[1]

[4] Appellant's remaining points, 3 to 7 inclusive (already quoted in substance), must be prefaced by the following facts as reflected in the four bills of exception: In addressing the jury panel on voir dire defense counsel stated that plaintiff had filed her notice and claim with the Industrial Accident Board, not advising the panel, however, of whether compensation had been allowed or denied. Thereafter plaintiff's counsel, in absence of jury, made to the court motions as follows: That defense counsel be instructed, when Mrs. Dovie Ray Baker later became a witness, that she not be interrogated relative to said claim for compensation filed with the Industrial Accident Board or amount of the award (stating grounds), the court granting the motion to the extent that counsel may not refer to any amount received by plaintiff and overruling same to the extent that inquiry could be made "into the filing of a claim with the Industrial Accident Board and the necessary elements including filing of the claim and that a final rul-

[1]Also quite dissimilar in fact are appellants' Texas cases of Gulf Refining Co. v. Rogers, Tex. Civ. App., 57 S. W. 2d 183, and Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S. W. 2d 995, 998. There the writings, referred to as commission agency contracts, were terminable at will of the Oil Company; in both cases the Company reserving extensive right of control; in one (Rogers) even to right to discharge employees of the lessee; in the other (Martin) the contract requiring Schneider, lessee, in addition to supervision strongly suggestive of a master-servant relationship, to perform such other duties in connection with the operation of his station as may be required of him "from time to time by Company."

ing was made by the Industrial Accident Board, without reference to what the ruling was." That plaintiff's counsel then moved the court to instruct the jury that the testimony in question be limited to impeachment purposes only or to show that plaintiff had made a prior inconsistent statement; the court indicating that it would probably instruct the jury to effect that the particular testimony was admissible for the purpose of showing "prior inconsistent position of the plaintiff." Defense counsel then questioned the plaintiff fully with respect to the matter, including processing of claim to final disposition, the court not later limiting the testimony to impeachment purposes. A similar motion was made to defendant's pleading of plaintiff's notice of claim, sustained to the extent that defendant's counsel was instructed not to read allegations relative to collection of compensation; and lastly, the particular exhibits (notice and claim) were permittedly taken to the jury room over plaintiff's objection. To none of above court rulings did plaintiff make or urge a motion for mistrial.

It will be noted that during course of the trial these exhibits had bearing on the issue of whether deceased Baker was an employee of the railroad rather than of Nichols within meaning of the Federal Employers' Liability Act, the court rejecting plaintiff's theory of Federal coverage; and submitting the case to the jury only as a common-law action. The later taking of notice and claim into jury room was objected to by appellant, "for the reason that said exhibits at this stage of the proceedings are highly prejudicial and inflammatory and have no bear-

ing on any issue in this case, the court having failed to submit plaintiff's theory that the deceased, Claude Baker, came under the terms and provisions of the Federal Employers' Liability Act and such claims being admissible if at all in the first place only on the question of showing that the plaintiffs had taken an inconsistent position before the Industrial Accident Board, with the position that they are now taking in this case; that to permit the jury to take these exhibits into the jury room is calculated to cause them to discuss and consider the question of whether or not plaintiff and her children have been fully compensated for this injury by having made claim to the Industrial Accident Board of the State of Texas upon the death of Claude Baker as an employee of W. H. Nichols Company, Inc."

In above connection, the jury found that defendant's engine men failed to exercise ordinary care in warning of approach of train and that such failure was a proximate cause of Claude Baker's death; likewise finding that Baker's failure to keep a proper lookout was a proximate cause of his death; also that prior to the arrival of the train, deceased was in a place of safety, stepping therefrom into path of the train when he knew or should have known of its approach, such action being a proximate cause of death. The jury assessed damages in the total amount of $28,045. All other issues were answered against the party relying thereon. At time of death Claude Baker was 56 years of age.

The trial court should have withheld the exhibits in question from any consideration by the jury in their delib-

erations because, on refusal of plaintiff's requested issues, they had no bearing upon any of the issues raised under the court's charge; the court's ruling, however, amounting to no more than harmless error. Rule 434, T. C. P. The objectionable instruments were in no wise relevant to the issues on contributory negligence found against deceased; the jury awarding substantial damages—an amount not so low as to demonstrate that the jury was motivated by prejudice, bias or other improper motives, and appellant does not so claim. In fact, from the record as a whole, there appears nothing to indicate that plaintiff suffered probable harm from admission of the exhibits or matters relevant thereto as complained of by appellant.

All points of error, upon careful study, are overruled; an affirmance of this judgment rendering unnecessary any discussion of counterpoints brought forward by appellee.

Affirmed.

No. 15,298

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

From District Court of Dallas County,
Friday, December 6th, 1957

Opinion of the Court delivered by Mr. Young, Associate Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the

opinion of the Court that there was no error in judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellees, Texas & Pacific Railway Company and W. H. Nichols & Company, have and recover of the appellant, Dovie Ray Baker, individually and as Administratrix of the estate of Claude Baker, and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and of Standard Accident Insurance Company, her surety upon appeal bond, all costs in this behalf incurred or expended, for which execution may issue; and that this decision be certified below for observance.

DOVIE RAY BAKER

15346
15298

v.

TEXAS & PACIFIC RY. CO.,

Friday, January 17, 1958

This day came on to be heard the motion of appellant for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

"IN THE SUPREME COURT OF TEXAS

April 30, 1958

No. A-6718

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

From Dallas County

Fifth District.

"This day came on to be heard application of petitioners for a writ of error to the Court of Civil Appeals for the Fifth District, and, after due consideration, the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused; that the applicants, Dovie Ray Baker, individually, and as Administratrix of the estate of Claude Baker, deceased, and as next friend of her minor children, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker, and their surety, Standard Accident Insurance Company, pay all costs incurred on this application."

"June 18, 1958.

No. A-6718

DOVIE RAY BAKER, et al.,

v.

TEXAS & PACIFIC RY. CO.,

From Dallas County.

Fifth District.

"This day came on to be heard petitioners' motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled."

APPENDIX B

CONSTITUTIONAL PROVISION AND STATUTES

THE 7TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

In suits at law, where the value in cortroversy shall exceed $20,000, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, ma-

chinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (21)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies;

and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable division thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(21) *Power of Commission to require adequate facilities or extension of line—Penalty.* The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] party to such proceeding to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this part [§ 1-5, 5b-15a, 16, 17-23. 26, 27 of this title], and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity,

or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any public carrier subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue in the United States and may be recovered in a civil action brought by the United States.

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No. 363

In the

Supreme Court of the United States

DOVIE RAY BAKER, *et al.*,
Petitioners,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The question in this case is whether petitioners' decedent was an employee of respondent because:

(a) Respondent owed decedent a non-delegable duty to perform the particular work through its own employees;

(b) The purpose or intent of the contract between respondent and decedent's employer was to exempt respondent from any liability created by the Federal Liability Act; or

(c) The contract between respondent and decedent's employer, at common law, constituted the employer an agent of respondent as distinguished from an independent contractor.

This case has been tried twice to a jury resulting in both instances in a verdict for respondent.

Petitioners have been compensated for the death of decedent under the Workmen's Compensation Laws of Texas. (Tr. 14.)

Petitioners are Dovie Ray Baker, widow of Claude Baker, deceased, individually and in her capacity as administratrix of the Estate of deceased, and as next friend for the minor children of herself and decedent, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker. Claude Baker, deceased, was hired by W. H. Nichols & Co., Inc. (S. F. 104.) Petitioners seek the coverage of the Federal Emoployer's Liability Act in spite of their previous representations to Nichols' compensation carrier that deceased was an employee of Nichols.

Respondent and W. H. Nichols & Co., Inc. entered into a written contract covering the work, a part of the performance of which deceased was engaged in at the time of his death. (Tr. 37-40.) The work to be performed was designated "grouting", which is designed to take care of water-pockets in Respondent's railway embankment. (S. F. 378.) The contract was entered into as a result of Respondent having advertised for bids. (S. F. 370.) The proposal for bids spelled out in detail the work to be done. (S. F. 372.) The nature of the work to be performed and

the place of performance were specified in the contract. (Tr. 38.) The contract provided for payment of a specified price and did not call for a cost plus arrangement. (Tr. 38.) The contract designated W. H. Nichols & Co., Inc. an independent contractor and provided that Nichols would not be subject to the detailed supervision and direction of Respondent, but would be responsible to Respondent only for the final results in the accomplishment of the work.

The work required special equipment which Respondent did not have. (S. F. 171.) The contract was entered into because Respondent did not have the necessary equipment or knowledge to perform the work. (S. F. 371.) The work called for in the contract was grouting (filling water-pockets in the roadbed with a mixture of sand, water and cement). The number of perforations to be made in the performance of the grouting work was left to the contractor (S. F. 172). The area of track to be grouted was determined generally by Respondent's roadmaster after making an inspection of the track. The decision as to where the grouting would be placed, the perforations, the drilling of holes, and where the mud pump would be used were determined by Nichols (S. F. 173, 379) Grouting is not regular maintenance, but is a special type of maintenance and is extraordinary maintenance. (S. F. 175 and 371.)

Respondent's inspector on the job, Slaton, had the duty of seeing that the work did not cause any trouble in the operation of trains (S. F. 176), and to see that the work performed by Nichols conformed to the contract. (S. F. 376.)

Deceased was employed by W. H. Nichols & Co., Inc.'s foreman. (S. F. 104.) Nichols' foreman told him when to come to work and what to do (S. F. 43); when to quit work and when the machine was going to be moved (S. F. 43). Nichols paid his employees, deducted their income tax (S. F. 46); and deducted their social security. (S. F. 47.) Respondent never paid Nichols' employees. (S. F. 47.) Respondent never made any deductions from their salaries, never told them when to come to work, nor when to quit. (S. F. 47.) Nichols' foreman fired Nichols' employees. (S. F. 48.) Petitioner understood that her decedent worked for Nichols. (S. F. 192-193.)

Petitioner filed her notice for fatal injuries and claim for workmen's compensation benefits with the Industrial Accident Board of the State of Texas, and in both instruments specified the employer of the deceased to be W. H. Nichols & Co., Inc. (S. F. 194-196.) Employers Mutual Liability Insurance Company of Wisconsin, the compensation carrier for W. H. Nichols Co., Inc. recognized its liability and made a lump sum settlement on account of the death of decedent, and paid workmen's compensation benefits in the sum of SEVEN THOUSAND NINE HUNDRED NINETEEN AND 94/100 ($7,919.94) DOLLARS (Tr. 14).

Petitioners have never acknowledged that they improperly claimed benefits under the Workmen's Compensation Laws of the State of Texas, and have done nothing to change the representations which they made upon which they recovered workmen's compensation benefits. (S. F.

196.) Petitioners do not even acknowledge that the workmen's compensation carrier, Employers Liability Mutual Insurance Company of Wisconsin, will be entitled to recoup its payment in the event Petitioners should be successful in this effort to recover from Respondent. (S. F. 207.)

The contract between Respondent and W. H. Nichols & Co., Inc. was not a scheme or device to evade the provisions of the Federal Employer's Liability Act. It was entered into because Respondent did not have the equipment or knowledge necessary to do the work. The work is extraordinary maintenance. (S. F. 371.)

ARGUMENT

The Petition should be denied because:

1. The judgment of the Court of Civil Appeals of the State of Texas was correct;

2. The judgment can be sustained on the basis of the laws of the State of Texas without regard to federal questions; and

3. No question of importance is presented to the Court because,

(a) The disposition of the case is controlled by the particular facts applicable to the parties;

(b) The effect of the decision is limited in its scope to other employees employed under the contract in question.

1. The Judgment of the Court of Civil Appeals is Correct.

By its terms the Federal Employers' Liability Act is applicable only to a person suffering injury while he is employed by a common carrier by railroad. *45 U. S. C. Sec.*

51.[1] This Court held in *North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 256, 58 L. Ed. 591, 34 Sup. Ct. 305:*

> "In order to bring the case within the terms of the Federal Act (35 Stat. 65, c 149, printed in full and 223 U. S., page 6) defendant (the Railroad) must have been, at the time of the occurrence in question, engaged as a common carrier in Interstate Commerce, and plaintiff's intestate must have been *employed* by said carrier in such commerce." (Emphasis supplied.)

The words "employee" and "employed" are used in the statute in their natural sense and are intended to describe the conventional relation of employer and employee. *Robinson v. Baltimore and Ohio R. R. Co., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849. Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied, 1954), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429.* That this court still recognizes the validity of this statement of the law is demonstrated in Footnote 5 of the recent opinion in *Sinkler v. Missouri P. R. Co., 356 U. S. 326, 78 Sup. Ct. 758, 762, 2 L. Ed. 2d 799.*

a. *Respondent Owed Decedent No Non-Delegable Duty.*

Petitioner seeks to impose liability on Respondent on the theory that it had a non-delegable duty to maintain its roadbed with the corrollary postulate that such maintenance could be performed only by its own employees. Respondent's duty to maintain its roadbed is to its passengers and not to its contractor's employees. Such duty is not non-delegable insofar as employees of independent contractors are concerned. *Norman v. Spokane-Portland & Settle Ry.*

[1] Appendix, page 15.

Co., 101 Fed. Sup. 350, affirmed, 192 Fed. 2d 1020, certiorari denied, 342 U. S. 945, 72 Sup. Ct. 558, 96 L. Ed. 703; Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 848 (certiorari denied), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429; Tinsley v. Massman Construction Co., et al., 270 S. W. 2d 835 (Sup. Ct. Missouri); and *Lees v. Chicago and Northwestern Ry. Co., 89 N. E. 2d 418 (Illinois Appellate Division).*

b. *No Evidence of Respondent's Intent to Evade the Provisions of the Federal Employers Liability Act.*

The only evidence germane to Respondent's intent in contracting with W. H. Nichols & Co., Inc. is the testimony of its assistant chief engineer that the contract was not a scheme or device to circumvent the Federal Employers' Liability Act; that the contract was entered into because Respondent lacked the equipment and knowledge necessary to do the work. (S. F. 371.) The contract was let on bids. (S. F. 370.) There is no evidence of stock ownership in Nichols by Respondent. (S. F. 166.) There is no evidence that Respondent had ever performed this extraordinary maintenance with its own employees or that any of Nichols' officers or employees had ever been in the employ of Respondent.

The only prohibition of the Act *(45 U. S. C. Sec. 55)* is that any contract, rule or regulation or other device whatsoever, "the purpose or intent of which shall be" to permit the common carrier to exempt itself from the liability created by the Federal Employers' Liability Act shall be void. It is clear from the very wording of the statute as

well as from cases such as *Cimorelli v. N. Y. Cent. Ry. Co., 148 Fed. 2d 575; Erie Railroad Co. v. Morgue, 23 Fed. 2d 664* and *Lees v. Chicago & Northwestern Ry. Co., 89 N. E. 2d 418 (Illinois Appellate Division)*, that whether the "purpose or intent" of the contract is to exempt a carrier from liability created by the Federal Employers' Liability Act is a question of fact. There was no evidence before the court below upon which a finding could have been predicated that Respondent had the intent of evading its responsibilities under the Federal Employers' Liability Act. In any event Petitioners waived any right which they may have had to secure a favorable finding of fact on that issue, as will be later demonstrated.

c. *No Evidence of Probative Value Raising Issue of Nichols' Status Being Other Than That of Independent Contractor.*

The contract between Respondent and Nichols is clear that Respondent did not retain the *right* of control of the details of the performance of the work. It is the *right* of control which is determinative of the issue of whether a contractor is an independent contractor or merely an agent of the owner. *Chicago, Rock Island & Pacific Ry. v. Bond, 86 Sup. Ct. 403, 60 L. Ed. 735, 240 U. S. 449, Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied), 347 U. S. 904, 74 Sup. Ct. 429, 98 L. Ed. 1063.* The fact of actual exercise of control by the railroad is immaterial. The controlling factor is the right or authority to control. *Cimorelli v. New York Central Ry. Co., 148 Fed. 2d 575, 578.* That Respondent's inspector, Slaton, may have

given instructions with respect to the mixture being used when it did not comply with the specifications, or other similar instructions is immaterial. Respondent did not retain the right of control of the details of the work.

> "The mere fact that the employer reserves the right to supervise or inspect the work during its performance does not make the contractor a mere servant, where the mode and means of performance are within the control of such contractor." *Conasauga River Lbr. Co. v. Wade, 221 Fed. 2d 312, 315 (certiorari denied), 350 U. S. 949, 76 Sup. Ct. 324, 100 L. Ed. 827.*

All of the indicia of the independent nature of Nichols' employment are present. *Del Vecchio v. Penn. R. R. Co., 233 Fed. 2d 2, 5, Conasauga River Lbr. Co. v. Wade,* supra.

2. Judgment Can Be Sustained on Local Law.

In the court below Petitioner relied on the dicta in *Miles v. Penn. R. R. Co., 182 Fed. 2d 411,* where the court said:

> "Admittedly, the defendant could not have escaped the liability imposed by this Act by contracting with the contractor to take over the *ordinary* and necessary maintenance work on track which is used in Interstate Commerce." (Emphasis supplied.)

Petitioners also relied on their contention that the contract between Respondent and Nichols was a device to evade the provisions of the Federal Employers' Liability Act. Whether the work was ordinary or extraordinary maintenance and the intent of the contracting parties at most suggest fact issues. No issues were submitted by the court to the jury inquiring whether the work performed by Nichols was ordinary or extraordinary maintenance, or whether the intent of Respondent was to evade the pro-

visions of the Federal Employers' Liability Act. No special issues were requested by Petitioners submitting either of these theories. No issue having been submitted or requested by Petitioners, Petitioners, under the rules of procedure of the State of Texas, waived any right of recovery that might be based on favorable findings on such issues. *Texas Rules of Civil Procedure, Rule 279.*[1]

Having waived any right they may have had to fact findings by the jury on the questions just discussed, the trial court, as well as the court below, had before it the sole question of whether at common law there was any evidence that Nichols occupied any status other than that of independent contractor. The law in Texas is against the contentions of Petitioners and supports the judgment of the court below. The retention of the right or the exercise of the right to see that the work performed by the contractor complies with the contract does not transform the contractor into an agent as distinguished from an independent contractor. *Security Union Ins. Co. v. McLeod, 36 S. W. 2d 449, 451 (Comm. of App.); Simonton v. Perry, 62 S. W. 1090, 1091 (Civ. App.); Travelers Ins. Co v. Ray, 262 S. W. 2d 801, 803, Er. Ref.; Texas Employers' Insurance Association v. Harper, 249 S. W. 2d 677, er. ref., n. r. e.*

By its terms the workmen's compensation laws of the State of Texas are inapplicable to employees of a steam railroad. *Article 8306, Sec. 2, Revised Civil Statutes of Texas, 1925.*[2] Petitioners filed their notice of fatal injury and claim for workmen's compensation benefits with the

[1] Appendix, page 15.
[2] Appendix, page 17.

Industrial Accident Board of the State of Texas designating W. H. Nichols & Co., Inc. as employer (S. F. 194-196). Employers Mutual Liability Insurance Company of Wisconsin, the compensation carrier for Nichols, paid Petitioners compensation benefits in the sum of SEVEN THOUSAND NINE HUNDRED NINETEEN AND 94/100 ($7,919.94) DOLLARS (Tr. 14). Even after the filing of the instant suit in which Petitioners contend that their decedent was an employee of Respondent, they have done nothing to withdraw their representations to the workmen's compensation carrier. (S. F. 196.) Petitioners' counsel does not even concede that the compensation carrier is entitled to recoup its compensation payment (S. F. 207) in spite of the right of subrogation afforded compensation carriers against negligent third parties by the workmen's compensation laws of the State of Texas. *Article 8307, Sec. 6a Revised Civil Statutes 1925.*[1]

The notice of fatal injury and claim for death benefits under the workmen's compensation laws of the State of Texas were admissible against Petitioners as admissions. *Texas General Indemnity Co. v. Scott, 253 S. W. 2d 651, 152 Tex. 1.*

At the outset Petitioners had the option of contending that their decedent was an employee of Respondent and that they, therefore, were entitled to maintain their action under the Federal Employers' Liability Act, or of claiming that their decedent was an employee of Nichols and that they were entitled to the benefits of the workmen's compen-

[1] Appendix, page 17.

sation laws of the State of Texas. Petitioners pursued their remedy to fruition under the workmen's compensation statutes. By filing their notice of fatal injury and claim for compensation Petitioners made admissions against any interest they may have had under the Federal Employers' Liability Act. On the basis of this admission the court below could find that there was no issue of decedent occupying the status of employee of Respondent.

3. No Question of Importance is Presented.

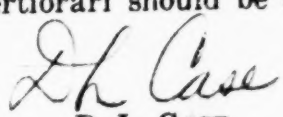
From the petition it is apparent that Petitioners have undertaken to present a fact issue to this Honorable Court. The facts are peculiar to the contract between Respondent and Nichols and to the relationship of the parties under the contract. It is obvious from the record as a whole that the number of employees situated similarly to deceased is limited, and that the contract must have long since been performed. A reversal of the decision below could affect only a small number of employees of Nichols whose claims, if any they have, in all probability have long since been barred by the limitations provisions of the Federal Employers' Liability Act. The relief, therefore, which Petitioners seek is in reality only a review of the facts before the courts below which could at most have an affect on a segment of the population. The court has heretofore refused certiorari on substantially the same fact questions. *Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429.*

CONCLUSION

The decision of the court below conforms to the applicable decisions of this Honorable Court as well as the various courts of appeal. This Honorable Court has seen fit to deny certiorari in a fact situation substantially identical to that before the court below. The petition presents no novel question of law, but one that has been decided many times by this Court as well as the Courts of Appeals and presents only a limited fact situation for review under the applicable decisions.

The action of the court below is amply justifiable by the law of the State of Texas without regard to federal decisions.

The position of Petitioners is in essence that they are dissatisfied with the decisions of the courts below and seek mere appellate relief. Respondent, therefore, respectfully submits that the petition for certiorari should be denied.



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APPENDIX

U. S. C. Title 45, Sec. 51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Texas Rules of Civil Procedure. Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the writ-

ten pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing at any time before the judgment is rendered, make and

file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Revised Civil Statutes of the State of Texas 1925. Art. 8306, Sec. 2. Application of law; exceptions

Sec. 2. The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employes of any firm, person or corporation having in his or their employ less than three employes, nor to the employes of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier. Any employer of three or more employes at the time of becoming a subscriber shall remain a subscriber subject to all of the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employes may at times be less than three.

Revised Civil Statutes of the State of Texas 1925. Art. 8307, Sec. 6a Recovery from third person, subrogation; compromise

Sec. 6a. Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employe may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not

against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under this law. If compensation be claimed under this law by the injured employe or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employe in so far as may be necessary and may enforce in the name of the injured employe or of his legal beneficiaries or in its own name and for the joint use and benefit of said employe or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employe or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employe or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employe or his beneficiaries and the approval of the board, upon a hearing thereof.

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PETITIONERS REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER *et al.*, *Petitioners*

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent*

PETITIONERS REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

I. Petitioners Desire to Clarify Any Incorrect Impression of the Record that Might be Construed from Brief for Respondent in Opposition.

Respondent does not undertake to deny or answer Petitioners' argument that they were deprived of their right to a jury trial on the issues raised under FELA. Instead Respondent undertakes to avoid the consequences of such denial of a jury trial by laying undue emphasis on the state workmen's compensation aspect of the case. This aspect of the case is irrelevant to the FELA issues involved except possibly as part of the facts that would have been

considered by the jury if it had been permitted to pass on the question of whether Nichols was or was not an independent contractor. And it is completely irrelevant to the ultimate question of Respondent's liability to Petitioners for negligently causing Baker's death.

But although actually irrelevant to any issue or questions now before this Court, that fact that Petitioners received a compensation award has been injected by Respondent in such a manner that Petitioners are compelled to point out its proper setting in the record. One could get the impression from Respondent's brief that Petitioners seek double compensation. Or that Petitioners' receiving a compensation award for Baker's death before learning of the relationship between Nichols and Respondent, is doing something improper in seeking to hold Respondent liable for negligently causing Baker's death.

In the "Statement" of Respondent's brief, page 4, it is stated "Petitioners have never acknowledged that they improperly claimed benefits under the Workmen's Compensation Laws of the State of Texas, * * *." There is no fact in the record to support the statement that Petitioners "improperly" claimed such benefits. The phrasing of this statement is akin to the old familiar loaded question "Have you stopped beating your wife?"

Respondent continues with the statement on page 5:

> "Petitioners do not even acknowledge that the workmen's compensation carrier, Employers Liability Mutual Insurance Company of Wisconsin, will be entitled to recoup its payment in the event Petitioners

> should be successful in this effort to recover from Respondent. (S. F. 207.)"

and then with the statement on page 11:

> "Petitioners' counsel does not even concede that the compensation carrier is entitled to recoup its compensation payment (S. F. 207) in spite of the right of subrogation afforded compensation carriers against negligent third parties by the workmen's compensation laws of the State of Texas."

These statements do not accurately reflect the record. Without cluttering this reply with details, it is necessary only to point out that:

(1) Petitioners state in their pleading that if Baker was not within the provisions of FELA, that Nichols' compensation carrier, Employers Mutual Liability Insurance Co. of Wisconsin (hereinafter called "Insurance Co.") is subrogated to the rights of Petitioners out of any amount recovered by Petitioners from Texas and Pacific Railway Co. (Tr. 14-15.)

(2) During the trial on October 3, 1956 it was stipulated by counsel for both parties that if the Insurance Co. has the right of subrogation against Respondent, T & P Ry. Co., the amount to which it was entitled is seven thousand nine hundred and nineteen dollars and ninety-four cents.

(3) At the same time counsel for both parties agreed that they did not stipulate that said Insurance Co. is entitled to subrogation in the event it be found that Baker was covered by the provisions of FELA (S. F. 207-208).

(4) On October 4, 1956, Insurance Co. filed a plea in intervention claiming a right of subrogation to the rights

of Petitioners to the extent of payment made to Petitioners under the Workmen's Compensation Act and entitled to have judgment out of any recovery from T & P Ry. Co. Insurance Co. plead in the alternative that if Baker is found to be an employee of T & P Ry. Co. that the compensation award to Petitioners was made by mutual mistake and that it was entitled to recover the award out of any recovery by Petitioners from T & P Ry. Co. (Tr., pp. 30-34.)

(5) And on the same day, the Respondent, T & P Ry. Co., amended its answer to state that if it should be determined that Baker was an employee of Respondent then the Insurance Co. is not entitled to be subrogated by reason of payment of Workmen's Compensation to Petitioners because by making such payment it was a pure volunteer. (Tr., p. 25.)

No denial or answer to Insurance Co.'s plea of intervention was ever made by Petitioners.

II. The Compensation Award to Petitioners Was a Fact for the Jury to Consider had It Been Permitted to Pass on Whether Nichols Was or Was Not an Independent Contractor.

It is arguable that the fact that Nichols carried Workmen's Compensation insurance and other insurance, to meet the indemnity obligations imposed upon him by the contract with Respondent, is a fact indicating that Nichols was really an independent contractor. But the more plausible argument is that it is a fact from which the jury could

have found he was not. This latter argument is supported by direct authority.

In *Erie R.R. Co. v. Marque*, 23 F. 2d 664 (C. C. A. 6th 1928), the so-called independent contractor was also required by the contract with the railroad to comply with the Workmen's Compensation Laws of the state. The court said at p. 665 that it had no trouble in believing the intent of this provision was to evade the force and effect of FELA for the purpose of substituting the state Workmen's Compensation Act for FELA because the smaller compensation given under the state act would make it more economical from the employer's standpoint to operate.

In *Cimorelli v. New York Cent. Ry. Co.*, 148 F. 2d 575 (C. C. A. 6th 1945), relied upon by Respondents on page 8 of their brief, Duffy, the alleged independent contractor was required to carry full insurance coverage including Workmen's Compensation. And like the case at bar, there was a special provision in the contract that Duffy was to perform the work as an independent contractor with exclusive supervision of the work. The parties by stipulation submitted to the trial court the issues to be decided as a matter of law. The trial court held Duffy was an independent contractor and that plaintiff was not an employee of the railroad. This holding was reversed on the appeal.

Even where the railroad itself is a subscriber to a state workmen's compensation insurance for its employees engaged in intrastate commerce, most of the cases have held or recognized that the payment and acceptance of compensation under the state workmen's compensation act

did not preclude the maintenance of an action under FELA by one engaged in interstate commerce within the meaning of that act. The basis of these cases is that award, settlement or acceptance of benefits under workmen's compensation cannot be treated as res judicata of the issue of the employee's engaging in intrastate or interstate commerce. *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227 (C. C. A. 2d 1934), cert. den. 294 U. S. 715 (1935); *Pritt v. West Va. Northern R. Co.*, 51 S. E. 2d 105 (S. C. W. Va. 1948), cert. den. 336 U. S. 961 (1949). And see annotation at 6 ALR 2d 581 (1948) which is directly in point.

There is no basis in the record to argue that the compensation award to Petitioners was res judicata of the issue of whether Nichols was or was not an independent contractor. Nor any basis that it created any election, waiver or estoppel with regard to such issue. At the most, it was merely a fact for the jury's consideration—if it had been permitted to pass on said issue.

Respectfully submitted,

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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 363

DOVIE RAY BAKER *et al.*, *Petitioners*,

v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent.*

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR THE PETITIONERS

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No. 363

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v.

TEXAS AND PACIFIC RAILWAY CO., *Respondent.*

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

---

BRIEF FOR THE PETITIONERS

I. Citation to Opinion Below

The opinion of the Court of Civil Appeals (R. 204-220), is not officially reported but is printed in 309 S. W. 2d 92. The Supreme Court of Texas wrote no opinion in refusing Petitioners' application for a writ of error.

II. Jurisdiction

The judgment of the Court of Civil Appeals was entered on December 6, 1957. (R. 221.) The order denying Peti-

tioner's motion for rehearing by said Court of Civil Appeals was rendered and entered on January 17, 1958 (R. 234). Petitioners' application for writ of error to the Supreme Court of Texas, timely filed, was refused, no reversible error on April 30, 1958 (R. 235). The order denying Petitioners' motion for a rehearing of their application for writ of error by the Texas Supreme Court was rendered and entered on June 18, 1958 (R. 247). The Court of Civil Appeals thus became in this case the highest court of the state in which a decision could be had. *Panhandle Eastern Pipe Line Company v. Calvert*, 347 U. S. 157 (1954). Petition for writ of certiorari was filed on September 14, 1957, within ninety days after entry of judgment.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3) because Petitioners' cause of action is under the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C., Sections 51 et seq., and because a right and privilege is specially set up and claimed under said Act and under the Constitution of the United States and because the Court of Civil Appeals has decided questions of substance under that Act not heretofore determined by this Court and decided in a way probably not in accord with the applicable decisions of this Court.

III. Questions Presented

Petitioners are the widow and minor children of Claude Baker, who was killed when struck by Respondent's train on the 20th day of August, 1952, while in the regular course of his employment with W. H. Nichols & Co. as a

member of a crew doing a type of maintenance work for Respondent called "grouting" along the Respondent's main line double tracks. It is stipulated that the main line double tracks are used in the movement of freight and passenger trains in interstate commerce. (R 162.) Respondent's east and west-bound trains were passing each other at the time Baker was struck and the jury found that the negligence of Respondent's enginemen on the east-bound train which struck Baker was a proximate cause of Baker's death; that Baker's own negligence was a proximate cause of his death; and that Petitioners' damages totaled $28,045.00. (R. 26-38.) None of these findings have been questioned on appeal.

Substantial evidence was introduced that W. H. Nichols & Co. was not an independent contractor. (R. 75-131.) The trial court, refusing to permit Petitioners to present their case to the jury under the Federal Employers Liability Act (hereinafter called FELA), but applying state law, entered judgment for Respondent that Petitioners take nothing by their suit (R. 38-42), which judgment was affirmed by the Texas appellate courts. The questions presented are:

1. Whether the Texas courts have the power to deny Petitioners a jury trial to determine their federal rights under FELA when substantial evidence was introduced that the employer of the deceased, Claude Baker, doing maintenance work on Respondent's main line railroad bed, was not an independent contractor but a mere agent or employee of Respondent.

2. Whether Respondent had the power to exempt itself from liability to Petitioners under FELA by attempting to delegate to the employer of Claude Baker some of its duties imposed by law to maintain its main line roadbed carrying interstate commerce.

3. Whether Claude Baker was an employee of Respondent within the meaning of FELA because he was doing the work of Respondent closely and substantially affecting, and in the furtherance of, interstate commerce.

IV. Constitutional Provision and Statutes Involved

1. The constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States. Appendix "A" *Infra*, p. 45.)

2. The statutory provisions involved are Sections 1, 3, and 5 of the Federal Employers Liability Act, 35 Stat. 65, 66, 53 Stat. 1404, 45 U. S. C., Sections 51, 53 and 55; paragraphs (3), (4) and (21) of Section 1 of the Interstate Commerce Act, 41 Stat. 474, 49 U. S. C., Sections 1 (3), (4) and (21), and Articles 6506 and 6507, Vernon's Texas Statutes (1948). (Appendix "A" *Infra*, pp. 45-52.)

V. Statement

1. Material Facts

Claude Baker, previously a tenant farmer (R. 144-148), had been hired by W. H. Nichols & Co. (hereinafter called Nichols) and received his wage payments from Nichols. Four days after Baker was killed by Respondents' train

Petitioners filed a claim for workmen's compensation benefits and received a lump sum settlement of $7,919.94 from the compensation carrier for Nichols (R. 152, 153, 200-203). However, when Petitioners' counsel became aware of the nature of Baker's duties and of the contract between Nichols and Respondent, Petitioners' complaint and petition against Respondent originally based on a common law action for negligence was amended to set forth a claim based on FELA (R. 157, 158, 163, 164).

The basis of Petitioners' claim under FELA is that the contract between Respondent and Nichols provided that Nichols was to do certain maintenance and repair work on Respondent's railway tracks used in interstate commerce; that although the contract specified that Nichols was an independent contractor, the arrangement was in truth and in fact made to evade the provisions of FELA since Respondent controlled and had the right to control the details and the manner in which Nichols performed such maintenance work; that at the time Baker was killed he was performing work for Respondent in the furtherance of interstate commerce and was performing work so closely and substantially affecting interstate commerce as to entitle Petitioners to the benefit of the Federal Employers Liability Act and bring Baker within its terms and provisions. (R. 3-5.)

Evidence introduced to support Petitioners' claim under FELA include the contract and the extension of the contract between Respondent and Nichols. (Printed in the opinion of the Court of Civil Appeals.) (R. 204-207.) It pro-

vided for Nichols to furnish labor, equipment and water for grouting the roadbed of Respondent's double track main line at certain locations as specified by and to the satisfaction of Respondent's chief engineer or his duly authorized representative. Section 2 of the contract provided that Respondent pay Nichols on a per unit basis and transport free to and from the work site, the workers and equipment, but at Nichols' risk (R. 205, 6). Respondent furnished the sand and cement used in the grouting mixture. (R. 137, 138, 139.) Section 4 of the contract provided that Nichols indemnity Respondent for any and all liability arising from the contract or work performed under it. (R. 206.) Section 5 imposed upon Nichols all liability and indemnity to Respondent for taxes, contributions and comparable payments imposed by any government agency incident to payment by Nichols of any compensation to its employees (R. 206).

Evidence was introduced that W. J. Savages' (Respondent's assistant chief engineer) principal duties were to supervise the railroad division employees working on the maintenance of the roadbed and tracks and to make appropriations to the various divisions of the railroad for the upkeep of the tracks and structures (R. 132); that grouting work was for the purpose of sustaining, stabilizing, straightening and strengthening the roadbed by filling cracks and crevices with a cement mix (R. 64, 136) and is a method of putting the mix into the embankment to fill the voids and force out the water from water pockets that form in the roadbed embankment (R. 136), the locations

of which were laid out in the engineering department of Respondent (R. 180), based on the unstable positions of the tracks (R. 195), which Respondents specified within particular limits (R. 196); that maintenance of the roadbed and tracks is principally a matter of keeping the tracks in a safe and good riding condition; that low spots make the roadbed unsafe and interfere with the operation of high-speed trains and their elimination is a necessary part of the maintenance of the roadbed (R. 133); that grouting is one type of maintenance work done to preserve the roadbed in good condition. Savage first agreed that grouting work is simply part of the regular maintenance of the track; later he called it a special type of maintenance (R. 139) and still later under direct examination of Respondent's counsel he said he "would consider it rather extraordinary maintenance." (R. 192.)

Although Section 3 of the contract between Respondent and Nichols declared that Nichols "shall occupy the status of an independent contractor and shall not be subject to the detailed supervision and direction of the carrier [Respondent] but responsible to carrier only for the final results in the accomplishment of such work or services," Section 1 directed that Nichols was to grout roadbed at locations only as specified by and to the satisfaction of Respondent's chief engineer.

Contrary to the declarations in Section 3 of said contract, voluminous testimony by numerous members of the grouting crew may be summarized to show that in actuality they had been told by Nichols' foreman to obey the order of Re-

spondent's inspector, Slaton, who was on the job almost all the time while the crew was working. (R. 77, 101-103, 109, 114, 119, 123); that all the men obeyed Slaton (R. 77, 109); that Respondent's inspector Slaton would direct the crew members to thicken or thin the grout being used by adding more sand, cement or water (R. 76, 101, 108, 109, 114, 119, 130, 131).

Claude Baker's job was handling cement (R. 63). His duties were to open sacks of cement and pour cement in a hopper on the grouting machine while other crew members poured sand in the hopper (R. 73). The grouting machine was located 6 feet from the railroad tracks (R. 74). After Baker emptied the sacks of cement he would throw them in a pile at his feet and then take the pile across both mainline tracks and pile them up to be burned. Sometimes he would take the sacks across the tracks one at a time. (R. 75.)

No one but Slaton marked off the places in the roadbed where the points were to be driven into the ground so that the grout mixture could be pumped therein. The selection of such places was left solely up to Slaton (R. 76, 77, 108, 109, 114, 119, 120); and neither the pointman of the crew nor anyone else except Slaton had anything to do with the selection of the places where the points would be driven in the ground (R. 83, 84, 108, 109, 119, 120). Slaton would tell the men when and where to move to a new location after the grouting was finished at an old location (R. 76, 108). A primary duty of Slaton was to prevent the grouting under pressure from humping or throwing the tracks

out of cross level by seeing that the grouting men did not pump too much mixture in the embankment (R. 109, 195). But Slaton was very reluctant to admit even this degree of control on cross examination (R. 183-185). He did admit he saw to it that the grout mixture was correct (R. 186). Also to put out slow flags to let Respondent's trainmen know the grouting crew was at work and to control the grouting work so that it did not interfere with the operation of the trains (R. 83, 84). As admitted by Respondent's own witnesses (R. 140, 143), Respondent even prescribed the minimum distance from the tracks where the grouting machine was placed (R. 143).

Even cross-examination by Respondent's own counsel brought out certain facts raising a serious question about Nichols' status as an independent contractor (R. 83-85). It was thus revealed that Slaton would order a crew member to move a grouting point from the ground when the mixture bubbled out due to the inattentiveness of a crew member (R. 111). And one crew member when asked whether he worked for the T & P Railroad answered: "I don't know whether I was or not. I might—I might have been working for both. It was all I knew. I just—I was on the T & P railroad work." (R. 129.)

Respondent's assistant chief engineer admitted that if Respondent's roadmaster had decided after a period of time that all the grouting work needed had been done he had the right under the contract to terminate the work and that the area to be grouted was up to the railroad, as well as the number of feet to be worked (R. 142, 372);

that the contract did not cover any specific amount of money but that was left open to be determined from time to time (R. 193) and that the contract could be canceled by Respondent at any time (R. 194).

Evidence was also furnished by Respondent's assistant chief engineer and by Slaton that Respondent furnished the sand and cement used in the grouting mixture (R. 137) and that the contract provided that Respondent was to transport Nichols' men and equipment by railroad to and from the site of the work without charge; that Respondent could do the grouting work itself if it had the equipment; that the equipment used was a hydraulic pump called a "mud jack" that forced the grouting material into the railroad embankment under pressure; that such pumps are in common use in highway and construction work and are available for purchase by Respondent (R. 136, 137); that there was no skill required of grouting crew members in mixing the sand and cement and putting the points in the ground (R. 186, 197, 198); that the crew members were laboring men and rather uneducated (R. 186, 198); that it was debatable whether grouting required any particular skill and from an engineer's standpoint it should be done according to a pattern and there is some skill required to arrive at the best pattern (R. 136); that Respondent's Inspector Station had the right to require Nichols to make more perforations if Slaton thought they were not making enough and Slaton likewise had the right to require Nichols to put more sand in the holes or perforations (R. 141).

2. How Federal Questions Were Presented in the State Courts

Before the case was submitted to the jury, Petitioners asked the trial court to submit their specially requested issue No. 1 and later their specially requested issue No. 13. These specially requested issues were substantially identical and No. 13 reads as follows:

> "Do you find from a preponderance of the evidence that at the time Claude Baker, deceased, sustained his fatal injuries, W. H. Nichols & Company, Inc., did not bear the relationship to Texas & Pacific Railway Company of an independent contractor, as that term has been defined herein for you.
>
> "Answer 'It was not an independent contractor, or 'it was an independent contractor'.
>
> "Answer .....
>
> " 'An independent contractor' as used in the above Special Issue, is meant any person, who, in the pursuit of a business or occasion undertakes to do a particular work for other persons, and who has control of such work in respect to the details of the work to be performed, and over whom the person for whom the work is being done, has no right or control as to such details, and who represents the will of the person for whom the work is done, only as to the result of this work, and not as to the means or method by which it is accomplished."

The Petitioners also requested the court to submit to the jury their specially requested issue No. 12 reading as follows:

> "What do you find in terms of percentage to be the entire causal negligence, if any, attributable to Claude

Baker, deceased, and what attributable to Defendant, Texas & Pacific Railway Company?

"Answer: Attributable to Claude Baker, deceased ..... per cent.

"Answer: Attributable to the Texas & Pacific Railway Company ..... per cent."

But the court refused to submit to the jury any of the said specially requested issues. (R. 56, 57.)

On appeal to the Texas Court of Civil Appeals the following points were preserved and argued to the said court:

> **"First Point**—The Court erred in failing to submit Plaintiff's Specially Requested Issue No. 12, inquiring as to the percentage of negligence attributable to Defendant and that attributable to Claude Baker, deceased, because the evidence established as a matter of law that Claude Baker was covered by the provisions of the Federal Employers Liability Act and therefore his contributory negligence was not a complete defense to Plaintiffs' suit but would only diminish their recovery and Plaintiffs were entitled to have their theory of the case submitted in such issue. (R. 48.)
>
> **"Second Point**—The evidence was sufficient to raise the question of whether or not W. H. Nichols & Company, Inc. was an independent contractor, and therefore, the Court erred in failing to submit either Plaintiffs' Specially Requested Issue No. 1 or No. 13, inquiring as to such fact, which issue was raised by Plaintiffs' pleadings. (R. 47, 49.)

After the trial court's judgment was affirmed by the Court of Civil Appeals and Plaintiffs' motion for rehearing was overruled by the said court, Plaintiffs then applied

for a writ of error to the Supreme Court of Texas, urging the following points:

"**Point of Error Number One.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their Requested Issue No. 12 under the Federal Employers Liability Act (45 U.S.C., Sect. 51) because the Deceased, Claude Baker, was within the scope and coverage of that Act, and therefore Petitioners were deprived of their affirmative theory of the case. (Germane to Assignment of Error No. 15, and Points of Error Nos. 1 and 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Two.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to affirmative submission of their case under the Federal Employers Liability Act (45 U.S.C., Section 51) because they failed to request an issue inquiring into the intent and purpose of the contract between Deceased's employer and the Texas & Pacific Railway Company. (Germane to Point of Error No. 1, in Petitioners' motion for Rehearing.)

"**Point of Error Number Three.** The Court of Civil Appeals erred in holding that Petitioners were not entitled to submission of their affirmative theory of the case under the Federal Employers Liability Act (U.S.C., Sect. 51) because of their failure to request an issue inquiring whether the maintenance work that Deceased was performing at the time of his death was ordinary or extraordinary maintenance. (Germane to Point of Error No. 2 in Petitioners' Motion for Rehearing.)

"**Point of Error Number Four.** The Court of Civil Appeals erred in holding that there was no evidence that W. H. Nichols & Company, the Deceased's employer, was not acting as an independent contractor

> at the time Deceased met his death. (Germane to Point of Error No. 3 in Petitioner's Motion for Rehearing.)" (R. 222.)

The Supreme Court refused Petitioners' application for writ of error and Petitioners filed a motion for rehearing which again brought to the attention of the Supreme Court of Texas the points brought forth in Petitioners' application for writ of error. (R. 236, 237.) The Supreme Court of Texas subsequently overruled Petitioners' motion for rehearing on their application for writ if error. (R. 247.)

VI. Summary of Argument

Petitioners seek to have their rights under FELA determined on the theory that Claude Baker was an employee of Respondent at the time he was negligently killed by Respondent's train, because Nichols, who employed and paid Baker, was not really an independent contractor but was an agent or employee of Respondent.

Petitioners' first argument is that they were deprived of their constitutional right to a trial by jury on the FELA issues. Although such issues were raised by an abundance of substantial evidence, the trial court refused to submit them to the jury and this refusal has been upheld by the Texas appellate courts. Was Nichols an independent contractor or an employee of Respondent? Tests approved by this Honorable Court to determine this issue are whether Respondent had "control" or "right of control" over the details of the work being performed. Many witnesses, including some of Respondent's, testified in detail that Re-

spondent, through its inspector Slaton, had "control" and "right of control" and actually exercised control over almost all the details of the work of Nichols' employees, including Baker.

Also under the approved tests of "whose is the work being performed" and whose is the "power to control" there was evidence that the work being done was a type of maintenance work on Respondent's mainline roadbed. It was a part of Respondent's regular business performed by common laborers using ordinary and available tools under a contract terminable at the will of Respondent on a per unit or piecework basis rather than a lump-sum contract.

The Texas Court of Civil Appeals admitted Respondent exercised actual control of the details of the work but, misstating the law, held that such exercise of actual control was "not material." Then, ignoring all the evidence to the contrary it held as a matter of law that Respondent had no "right of control" of the details of the work. In so doing it violated the established federal rule that in passing on whether there is sufficient evidence to submit the issue to the jury it should look only to evidence and reasonable inferences which support Petitioners' case. *Wilkerson v. McCarthy*, 336 U. S. 53, 57 (1949). And it denied Petitioners their right to a trial by jury. *Schulz v. Penna. R. Co.*, 350 U. S. 523 (1956).

Petitioners' second argument is that Federal and Texas Statutes impose upon Respondent the obligation and nondelegable duty to maintain its tracks and roadbed. A type

of Respondent's non-delegable maintenance work was being done by Nichols' employees under a contract providing that Nichols fully indemnify Respondent for any liability arising from the performance of the work. Consequently Nichols carried Texas Wokmen's Compensation insurance on Baker and the other workers. The practical effect of the contract was to exempt Respondent from its liability to Baker under FELA in having this non-delegable maintenance work performed by Nichols. Therefore that contract is in violation of Sec. 55 of FELA. *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 613. *Erie R. Co. v. Marque*, 23 F. 2d 664 (C. A. 6, 1928).

Petitioners' third argument is that Claude Baker was doing the railroad's work. He, along with the rest of Nichols' employees and Respondent's regular maintenance crew, were engaged in a common endeavor as part of and in furtherance of Respondent's unitary enterprise. He was daily exposed to the risks inherent in railroad work just as regular maintenance employees. Therefore Baker should be classified as an employee of Respondent within the meaning of FELA. Cf. *Sinkler v. Missouri P. R. Co.*, 356 U. S. 326 (1958).

VII. ARGUMENT

POINT ONE: Petitioners were deprived of their constitutional right to a trial by jury to determine their rights under FELA because there was substantial evidence that Nichols, the employer of Claude Baker, doing

maintenance work on Respondent's main line railroad bed was not an independent contractor but was a mere agent or employee of Respondent.

1. *PETITIONERS WERE ENTITLED TO A JURY TRIAL ON FACT ISSUES RAISED UNDER FELA.*

The principle forming the basis for the correct decision on the first point has been repeatedly spelled out and especially emphasized by this Honorable Court in numerous cases arising under FELA. This principle is simple and basic: workers seeking to have their rights under FELA judicially determined have the inviolate right to a trial by jury. The jury plays a "pre-eminent role" in FELA cases, *Ferguson v. Moore-McCormick Lines*, 352 U. S. 521, 523 (1957). The jury is "part and parcel" of the workers' remedy under FELA, *Bailey v. Central Vermont R. Co.*, 319 U. S. 350 (1943). The jury, not the court, is the fact-finding body, *Schulz v. Penna. R. Co.*, 350 U. S. 523 (1956). The Seventh Amendment to the Constitution provides that the right of trial by jury shall be preserved.

Petitioners' theory of their rights under FELA essentially is that Nichols was not really an independent contractor but instead was an agent or employee of Respondent, therefore Nichols' deceased employee, Baker, was an employee of the railroad within the meaning of Section 51 of FELA and came under the protection and within the benefits of FELA.

In the case at bar the trial court refused to submit to the jury the ultimate fact issues raised by the evidence

that determine Petitioners' rights and remedy under FELA. The jury was thereby prevented from passing on Petitioners' rights arising under FELA. The result is that Petitioners were effectively prevented from presenting their case under FELA to the jury.

The evidence was sufficient to require submission of Petitioners' case under FELA to the jury and it was error not to do so. *Shulz v. Penna. R. Co., supra.* This Honorable Court said in *Senko v. La Crosse Dredging Corp.*, 352 U. S. 370, 374 (1957) that it's prior holding in *South Chicago Co. v. Bassett*, 309 U. S. 251 (1940)

> "that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact."

Likewise, in the case at bar the determination of whether Nichols was an independent contractor or an employee of Respondent should have been left to the jury because the jury has the same discretion in finding this fact as they have in finding negligence or any other fact.

2. THE MORE IMPORTANT TESTS WERE: DID THE EVIDENCE RAISE THE FACT QUESTION THAT RESPONDENT HAD "CONTROL" OR "RIGHT TO CONTROL".

The legal problem of determining when a particular relationship is that of employer-independent contractor or of employer-employee (master-servant) is to be solved in each

case on its particular facts and ordinarily no one feature of the relationship is determinative, *Cimorelli v. New York Cent. R. Co.*, 148 F. 2d 575, 577 (C. A. 6, 1945). Like issues of negligence or causation, the solution to this fact question calls "for the exercise of common sense and sound judgment under the circumstances of particular cases" and the jury is the tribunal to decide such disputed question of fact. Cf. *Schulz v. Penna. R. Co.*, 350 U. S. 523 (1956).

However, the generally accepted tests are the control or the right of control over the details of the work reserved by the employer, *Singer Mfg. Co. v. Rahn*, 132 U. S. 518 (1889); *Chicago-Rock Island & Pacific Ry. Co. v. Bond*, 240 U. S. 449 (1916). These tests greatly aid in the fact determination as to what extent the person doing the work is in fact independent in its performance, *Cimorelli v. New York Cent. R. Co.*, 148 Fed. 2d 575 (C. A. 6, 1945).

The Restatement of the Law, Agency 2d (1958) Section 220 (1) defines a servant or employee as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." One who is an independent contractor instead of an employee or servant, is not subject to the employer's control or right to control the physical conduct in the performance of the service. *Chicago Rock Island & Pacific Ry. Co. v. Bond*, supra. Consequently, Petitioners' specially requested issues which the trial court refused to

submit to the jury, embodied the generally accepted test of "control or right to control" the details of the work being performed (R. 53, 54, 57). (Quoted p. 11 *supra.)*

In the analagous relationship problem created by the negligence of the "borrowed employee," this Honorable Court said, in *Standard Oil Co. v. Anderson*, 212 U. S. 215 (1909) at pages 221, 222:

> "To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of the work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation where the work furnished is part of a larger undertaking,"

and further, it was stated at page 225:

> "In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control."

The tests of "whose is the work" and "whose is the power of control" were approved in those cases arising under FELA to solve the relationship problem created by one railroad borrowing employees of another railroad. *Linstead v. Chesapeake and Ohio Ry. Co.*, 276 U. S. 28 (1928) and *Hull v. Philadelphia & Reading Ry. Co.*, 252 U. S. 475 (1920).

3. *THERE WAS SUBSTANTIAL EVIDENCE THAT RESPONDENT EXERCISED CONTROL AND HAD THE RIGHT TO CONTROL THE DETAILS OF THE WORK.*

In the light of the more important tests indicated above, the statement shows with crystal clarity that Petitioners have been deprived of their constitutional rights and their rights under FELA to a trial by jury. The statement summarizes the substantial evidence in the record that Respondent through its inspector, Slaton, had the right to and actually exercised the power of control over the details of work of Nichols' employees, including the deceased Baker. This evidence alone was substantial enough to at least raise a question for the jury to determine whether Nichols was an independent contractor.

It is difficult to contemplate evidence that would tend to show in Respondent any greater control or right to control the details of the work being done by Nichols' employees. The workers were instructed to obey Slaton and they did. (Right to control and control.) Only Slaton selected and marked off the places directing the pointmen where the points were to be driven into the roadbed. (Actual control.) Slaton saw to it that the workers, including the deceased Baker, had the proper amount of sand, cement, and water so that the grouting mixture was not too thick or too thin. (Actual control.) Slaton prevented the workers from pumping too little or too much grouting mixture into the roadbed and thereby prevented them from getting the tracks out of cross level.

(Control and right to control.) Slaton admonished their inattentiveness. (Control and right to control.) Slaton told the workers when and where to move to new locations and instructed them how far from the tracks the machines should be placed. (Control and right to control.) Slaton controlled the total of the grouting operation so that it did not interfere with the operation of the railroad's trains. (Control and right to control.)

The jury was entitled to find the foregoing as facts and to conclude that Respondent had control or a right of control over Nichols' employees as to the details of the work. Cf. *Bailey v. Central Vermont R. Co.*, 319 U. S. 350 (1943). The trial court and the Court of Civil Appeals should have looked at this evidence and the reasonable inferences therefrom to determine whether there was a fact issue to support Petitioners' theory that Nichols was not an independent contractor but was Respondent's agent or employee because Respondent controlled or had the right to control the details of the work. *Wilkerson v. McCarthy*, 336 U. S. 53 (1949). Beyond question the above evidence related and repeated by many witnesses raised the fact question at issue.

4. *THERE WAS SUBSTANTIAL EVIDENCE THAT RESPONDENT HAD THE "POWER TO CONTROL" THE WORK AND THAT THE WORK BEING PERFORMED WAS RESPONDENTS.*

Yet the above evidence was but a part of the evidence available for the jury's consideration had it been permitted

to pass on the ultimate issue of the relation between Nichols and Respondent. Using the tests approved by this Honorable Court of "power to control" and "whose is the work being performed" the jury should have been allowed to consider the nature of the work as a fact indicating that Nichols was not an independent contractor. Admittedly the work was a type of maintenance work which normally is a part of the regular business of Respondent. The work was performed by unskilled laborers using tools and machines in common use and readily available in the market. It was work Respondent could have done with its directly hired maintenance workers. The jury could have reasonably concluded that "whose is the work being performed?" was Respondent's.

The jury likewise could have considered that Respondent owned and of necessity had to control the place of the work, it being Respondent's double track main line interstate right of way. The jury could have considered that Respondent furnished the sand and cement used in the grouting mixture and assumed the obligation of transporting the crew and equipment by railway to and from the work site.

As other matters of fact the jury could have been allowed to consider, indicating that Nichols was not an independent contractor but was controlled by Respondent and doing Respondent's work, were the contract provisions directing Nichols to grout Respondent's roadbed only at specified places and to the satisfaction of Respondent's chief engineer or his agent; together with the evidence from Respondent's own witnesses that the area, pattern and number of feet to be grouted was up to the railroad. Also, from

Respondent's own witnesses came the admission that under the contract Respondent's roadmaster had the right to terminate the work and Respondent could cancel the contract at any time. And Nichols was paid on a unit or piece-work basis ($.10 per linear foot of roadbed grouted, plus $.30 per cubic foot of sand pumped over roadbed measured dry) rather than on the basis of one over-all contract price for the entire job as is usually done with independent contractors. This was evidence of an employer-employee relationship similar to that involving piece-work done by a servant for his master, especially when coupled with the rights of Respondent to determine the area and number of feet to be grouted and even to terminate the work and cancel the contract at any time.

Surely from this abundance of powerful proof, much of it uncontradicted, the jury (had the court allowed it to perform its function) could have reasonably concluded that Respondent had control or the right to control the details of the work being performed or that the work being performed was Respondent's work and therefore Nichols was not an independent contractor. Indeed, the evidence appears stronger than the evidence in cases where it has been held as a matter of law that the nominal employer of the injured worker was not an independent contractor. *Erie R. Co. v. Marque*, 23 F. 2d 664 (C. A. 6, 1928); *Cimorelli v. N. Y. Cent. R. Co.*, 148 F. 2d 575 (C. A. 1945); *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (C. A. 6, 1949); *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N. E. 2d 537, 30 ALR 2d 503 (1951).

However, the first and main point that Petitioners desire to present is that the issue before the trial court and Texas Court of Civil Appeals was whether there was any evidence and reasonable inferences in the record which the jury could find that Nichols was not an independent contractor; that despite all of the evidence introduced which would enable a jury to reasonably find that Nichols was not an independent contractor, the trial court refused to let the jury pass on such issue and the trial court's refusal has been affirmed. The result is that Petitioners were effectively prevented from presenting their case under FELA to the jury.

If this judgment is allowed to stand, Claude Baker and workers like Baker doing the railroad's work and exposed to the dangers of such work, are deprived of a jury trial to determine whether they come under the provisions of FELA. If allowed to stand this judgment is an invitation to railroads to relieve themselves of many of their obligations under FELA by doing their maintenance work through so-called independent contractors. The judgment allows form to triumph over substance. These results are not within the intent of Congress in enacting Sections 51 and 55 of FELA as amended, and this Court has not permitted such results to stand. *Sinkler v. Missouri Pacific R. Co.*, 356 U. S. 326 (1958). *Rogers v. Missouri P. R. Co.*, 352 U. S. 500 (1957).

5. *THE STATE COURT'S OPINION MISAPPLIED THE LAW.*

The refusal of the trial court to tender to the jury Petitioners' specially requested issues effectively deprived Peti-

tioners of a jury trial on their affirmative theories under FELA but the opinion of the Court of Civil Appeals neither clearly states nor properly analyzes this fundamental problem. No authority cited by it is on the point in question and no authority has been found that supports its judgment. Its opinion does not apply the established federal rule that in passing on whether there is sufficient evidence to submit the issue to the jury it should look only to the evidence and reasonable inferences which support Petitioners' case. *Wilkerson v. McCarthy*, 336 U. S. 53, 57 (1949). Its opinion does not recognize the duty of the court under FELA to see that Petitioners' asserted federal rights governed by federal law are fully protected as the Congress intended them to be. *Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360 (1957). Instead the opinion clutches at straws to reach the erroneous conclusion that the trial court was correct in its denial to Petitioners of a jury trial on FELA issues.

Looking to that part of the opinion dealing with the issue in question,[1] it is seen that it depends principally

[1]This brief would be unduly lengthened by a minute detailed analysis of the opinion to reveal the numerous unwarranted conclusions and erroneous statements of law therein. Illustrative of some of the more glaring examples are:

Placing the burden on Petitioners to request an issue on the

> "* * * fact question * * * of whether the work of grouting was extraordinary maintenance, as testified by Engineer Savage, rather than ordinary; and again Appellant [Petitioners] cannot be heard to complain, no request having been made for submission of such an issue" (R. 215).

This was not an ultimate issue. But if it was, surely it was Respondent's burden.

The opinion (R. 216) says that the contract between Respondent and Nichols was not terminable at the will of Respondent, giving as a reason

(Footnote 1 continued on p. 27.)

on evidence deemed favorable to Respondent and draws only inferences favorable to Respondent. (R. 215-218.) Aided by such incorrect means it reaches the untenable conclusion that there was no evidence for the jury to pass on.

A. The Opinion Admits Respondent Exercised Actual Control of the Details of the Work; But, Misstating the Law, Held Such Exercise of Actual Control "Not Material."

The opinion states:

> "The instructions given by Inspector Slaton concerning details of the work, here emphasized by appellant, are simply referrable to the contract in question and his duty to require its satisfactory performance." (R. 217.)

This admits that Respondent's Inspector Slaton did give instructions to Nichols' employees concerning details of their work. It even asserts that the authority for such instructions lies in the contract itself, being "simply referrable to the contract in question and his duty to require its

(Footnote 1 continued from p. 26.)
for such conclusion: "Where a writing does fix a definite time for performance the law imputes a reasonable time." The reason given deals with the time for the performance of a contract rather than the point really at issue, namely whether the contract was terminable at will. The court's conclusion is equivalent to saying that there can be no written agreement terminable at will of one of the parties where there is no definite time for performance stated in the agreement. Such a proposition is of course incorrect on its face. Here again the court was looking only to inferences and rules favorable to Respondent rather than looking to the evidence and inferences arising therefrom favorable to Petitioners, as was its duty under the law. The opinion overlooks the testimony of Respondent's own witnesses that under the contract the area to be grouted was purely up to the railroad and that the contract could be cancelled at any time.

The opinion states (R. 217) "This contractor was in the specialized business of grouting." This statement is an unwarranted conclusion, since there was evidence in the record that grouting was merely a type of maintenance work done by ordinary machines readily available in the market and operated by common laborers.

satisfactory performance." The opinion then makes this startling conclusion:

> "The *fact* of actual interference or exercise of control by the employer is not material, absent the *right* or authority to interfere or control; Cimorelli v. New York Cent. R. Co., supra." (R. 217.) (Emphasis by the Court.)

This language misstates and misapplies the applicable rules of law. It is simple hornbook law that exercise by the employer of actual control of the details of the work of the employees of a nominal independent contractor is evidence that the contractor is not in fact independent.[2] Yet the

[2]For example: 56 C. J. S. Master and Servant, Sec. 3 (3), pages 53-55 states:

> "It has been variously held that control as to the manner, mode, and detail of the performance of the work is the main, essential, and decisive question; the chief and distinguishing criterion; the prime, decisive, determining and most important factor; the chief and controlling consideration; the most important element; the real test, and, likewise, such control has been held to be the essential, important, principal, primary, ultimate, basic, vital, supreme, decisive, and controlling test.
>
> "*Control*" *means* the right to control rather than its actual exercise; it is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant; if the employer has the right of control, it is immaterial whether he actually exercises it, although the extent of control actually exercised may be considered in determining the right of control. Where a master-servant relationship is created, the master's failure to assert or exercise his right of control does not change the relationship. On the other hand, although a contract creates a contractee-independent contractor relationship, it may be transformed into a master-servant relationship by the employer's assumption of control over the details of the work, and it has been held that the relationship of master and servant exists where the employer actually exercises control. The employer must have control over the physical conduct of the employee in the performance of the work, and in applying the test for purposes of tort liability, it should be directed to the particular factor or matter on which liability is sought to be established."

The law in Texas is really no different than elsewhere, for the Supreme Court of Texas recently said, in *Great Western Drilling Co. v. Simmons*, Tex. , 302 S. W. 2d 400, 403 (1957): "* * * the right of control in the alleged master over the detailed means whereby the alleged servant is to accomplish an ultimate result, may be as important as the actual exercise of that right, * * *."

opinion says it is "not material." Misstating the law, the opinion dismisses all of the evidence bearing on Slaton's exercise of actual control of the details of the work. But the question before the Court was whether there was a fact issue for the jury and in passing on this question the Court had the duty and obligation to look only to evidence and reasonable inferences which support Plaintiffs' claim. And the more important tests to be applied were whether there was evidence that Respondent had (1) control, or (2) right to control the details of the work. Misstating the law, the Court dismisses (1) "control" as "not material." Ignoring the evidence, the Court then decides as a matter of law, wrongfully, that there was no "right to control." No explanation is suggested as to how it is legally or logically possible for Respondent to have actual control of the details of the work of Nichols' employees and yet not have the right to such control.

Cimorelli v. New York Cent. R. Co., 148 F. 2d 575 (C. A. 6, 1945) is cited as authority for the above proposition. But *Cimorelli* is misinterpreted and its words distorted. *Cimorelli* stands for the converse of the proposition advanced by the Texas Court. In *Cimorelli* at p. 528 appears the following statement:

> "The fact of actual interference or exercise of control by the employer is not material. If the existence of the right or authority to interfere or control appears the contractor cannot be independent."

Thus *Cimorelli* actually held that even though the employer does not exercise actual control, the existence of "right of control" by the employer is sufficient. There-

fore, the lack of evidence of the employer's exercise of actual control is not material. In *Cimorelli* there was a lack of evidence showing the exercise of actual control by the employer (the railroad) of the details of the work of Duffy's (independent contractor) employees. But the Court found that the whole project involved so many interdependent details that the control of any one of them could not be surrendered by the railroad without disorganization of the whole and that from the very nature of the work its performance could not be committed exclusively to the discretion of the contractor. Therefore the Court concluded as a matter of law that the railroad had the right to control even though it did not exercise actual control of the details. The facts in the instant case support this reasoning. The facts are even stronger in the case at bar because there was admittedly an abundance of evidence of the employer's (Respondent's) exercise of actual control.

The facts in *Cimorelli* are strongly analgous to the facts in the case at bar. But the decision in *Cimorelli* is flatly contra. There the trial court held as a matter of law that the Duffy Construction Co. was an independent contractor. The Sixth Circuit Court of Appeals reversed this holding and held as a matter of law Duffy was not an independent contractor. In instant case, the trial court has held as a matter of law that Nichols was an independent contractor and the Texas Court has affirmed that decision.

Analysis of the cases of *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (C. A. 6, 1949) and *Pennsylvania R. Co. v. Roth*, 163 F. 2d 161 (C. A. 6, 1947), cert. den., 332 U. S.

830 (1947) brings out the errors of law made in the case at bar even more clearly.

In *Barlion* the railroad contracted with an "independent contractor" Art Schreck, Inc., to unload railroad cars, to stencil, mark, and store inbound shipments, and to remark and reload outbound shipments. Barlion, an employee of Schreck, Inc., was injured while working for Schreck, Inc., in the railroad yards, and sued the railroad under FELA. The trial court held as a matter of law Barlion was an employee of the railroad. The Court of Appeals' opinion was that its decision was controlled by the holding in *Pennsylvania R. Co. v. Roth, supra.* The facts in the *Roth* case were similar to those in the *Barlion* case. However, in *Roth* there was evidence of exercise of actual control of the details of the work of the employees of the "independent contractor" whereas in Barlion the Court emphasized at page 711:

> "But no one from the railroad company supervised him (Plaintiff Barlion) and none of the railroad employees had ever told him what to do or what not to do."

On that basis the railroad company tried to distinguish *Barlion* from *Roth* but the Court said at page 712:

> "The railroad had this right of control in the instant case to the same extent as it had in the *Roth* case, and it is the right of control, rather than its exercise, that determines whether or not a contractor is an independent contractor. The *Roth* case, therefore, cannot be distinguished on the ground that the control of the railroad company was there exercised whereas it was not exercised in the present case."

The Court of Appeals then held as a matter of law that Schreck, Inc., was not an independent contractor and that

Barlion was subject to FELA as an employee of the railroad.

So in *Roth*, as in the case at bar, the railroad exercised actual control of the details of the work of the contractor. Roth held, as a matter of law, that the contractor was not independent. But in the case at bar the court, admitting the railroad exercised actual control of the details of the work of the contractor, said that was "not material;" held there was no jury issue raised, and held as a matter of law, the contractor was independent.

It is submitted that the more reasonable conclusion in instant case and one that a jury might well make if it had an opportunity is that actual control of the details of the work of Nichols' employees by Respondent indicate that Respondent had the right and authority to exercise such control. "Fairminded men might reach different conclusions—" *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353 (1943). Certainly the Court of Civil Appeals' conclusion cannot be valid under the rules of this Honorable Court, because the duty and obligation of the trial court and of the Court of Civil Appeals was to consider the evidence and all reasonable implications arising therefrom, even though they may be conflicting, to determine if the fact issue was raised for the jury's decision as to whether Nichols was or was not an independent contractor. *Schulz v. Pennsylvania R. Co.*, 350 U. S. 523 (1956).

The admitted fact that Respondent did exercise control and give directions to Nichols' employees concerning the

details of their work was substantial evidence in itself that Respondent had the right and authority, as well as the power, to exercise such control and give such directions. A jury could find from this admitted fact alone that Nichols was really an agent of Respondent and was not an independent contractor. Also, whether Respondent had the "right to control" Nichols, was a question of fact for the jury to consider. It was one of the very elements included in the definition of independent contractor which Petitioners requested the trial court to present to the jury but which request was refused. (Page 11, *supra.)* The Court of Civil Appeals was clearly wrong in treating this as a question of law for it to decide.

B. The Opinion Is So Inconsistent That It Refutes Itself

The opinion denied Petitioners a jury trial by holding there was no evidence by which the jury could answer Petitioners' specially requested issue that Nichols was not an independent contractor. Yet it also holds that the evidence did not establish that Baker was covered by FELA as a matter of law on the basis that there was sufficient evidence favorable to Respondent to raise fact issues which should have gone to the jury on (1) the intent and purpose of Respondent and Nichols in making the contract, and (2) whether the maintenance work of grouting was "regular" maintenance work. It then held that Petitioners waived their right to have these two issues presented to the jury because Petitioners did not request them.

There can be little, if any, doubt that these two issues are mere evidentiary issues to be considered in deciding the

ultimate issue as to whether Nichols was an independent contractor. See quotation *Standard Oil Co. v. Anderson*, 212 U. S. 215, 225 on page 20 *supra*. Also see *Atlantic Coast Line R. Co. v. Treadway*, 120 Va. 735, 93 S. E. 560 (1917), cert. den., 245 U. S. 670 (1918). The jury could have, in determining whether Nichols was an independent contractor, given consideration to the evidence of the intent and purpose of the contract between Respondent and Nichols such as the reason why Nichols assumed such extensive liability under the indemnity clauses or why Respondent could cancel the contract at will. Likewise the jury could have, in determining whether Nichols was an independent contractor, considered evidence of the nature of the maintenance work done by Nichols. If they found that the maintenance work was an essential part of Respondent's operational duties imposed by law they could have concluded that Nichols necessarily could not be an independent contractor. If they considered it some extraordinary type of maintenance work that might possibly be delegated to an independent contractor then it would be some evidence that Nichols was in fact an independent contractor.

If the Court of Civil Appeals' opinion is correct in holding that there was evidence to raise these two evidentiary issues it is necessarily incorrect in holding that there was no evidence to raise the ultimate issue of Nichols' status as a contractor. Its denial of a jury trial to Petitioners was clearly incorrect. This case is an excellent example of the

lower court failing to respect the jury function in passing on disputed facts and in drawing inferences from proven facts. *Wilkerson v. McCarthy*, 336 U. S. 70, 71 (1949).

The opinion (R. 217) concludes that the issue is controlled by *Chicago Rock Island & Pacific Ry. v. Bond*, 240 U. S. 449 (1916) where William L. Turner was held an independent contrator under a contract with the railroad to make provision for a daily supply of coal for the operation of the railroad. But the issue in the *Bond* case was not the denial of a jury trial as is the issue here. In *Bond* a jury trial was had on the question of whether Turner was an independent contractor and the issue before this Honorable Court was whether there was any evidence that the Railroad had the "right to control" Turner. This Honorable Court holding that there was no such evidence said at page 455:

> "We are unable to concur with the learned court in its conclusion. There was, it is true, and necessarily, a certain direction to be given by the company, or rather, we should say, information given to Turner. But the manner of the work was under his control, to be done by him and those employed by him. He was responsible for its faithful performance and incurred the penalty of the instant termination of the contract for nonperformance. This was only a prudent precaution, indeed, necessary in view of the purpose of his contract, which was to make provision for a daily supply of coal for the operation of the railroad. The power given was one of control in a sense, but it was not a detailed control of the actions of Turner or those of his employees. It was a judgment only over results and a necessary sanction of the obligations which he

had incurred. It was not tantamount to the control of an employee and a remedy against his incompetency or neglect."

6. *THE BRIEF FOR RESPONDENT IN OPPOSITION*

A. Petitioners Desire to Clarify Any Incorrect Impression of the Record That Might Be Construed from Brief for Respondent in Opposition.

Respondent does not undertake to deny or answer Petitioners' argument that they were deprived of their right to a jury trial on the issues raised under FELA. Instead Respondent undertakes to avoid the consequences of such denial of a jury trial by laying undue emphasis on the state workmen's compensation aspect of the case. This aspect of the case is irrelevant to the FELA issues involved except possibly as part of the facts that would have been considered by the jury if it had been permitted to pass on the question of whether Nichols was or was not an independent contractor. And it is completely irrelevant to the ultimate question of Respondent's liability to Petitioners for negligently causing Baker's death.

But although actually irrelevant to any issue or questions now before this Court, that fact that Petitioners received a compensation award has been injected by Respondent in such a manner that Petitioners are compelled to point out its proper setting in the record. One could get the impression from Respondent's brief that Petitioners seek double compensation. Or that Petitioners receiving a compensation award for Baker's death before learning of the relationship between Nichols and Respond-

ent, is doing something improper in seeking to hold Respondent liable for negligently causing Baker's death.

In the "Statement" of Respondent's brief, page 4, it is stated "Petitioners have never acknowledged that they improperly claimed benefits under the Workmen's Compensation Laws of the State of Texas, * * *." There is no fact in the record to support the statement that Petitioners "improperly" claimed such benefits. The phrasing of this statement is akin to the old familiar loaded question "Have you stopped beating your wife?"

Respondent continues with the statement on page 5:

> "Petitioners do not even acknowledge that the workmen's compensation carrier, Employers Liability Mutual Insurance Company of Wisconsin, will be entitled to recoup its payment in the event Petitioners should be successful in this effort to recover from Respondent. (S. F. 207.)"

and then with the statement on page 11:

> "Petitioners' counsel does not even concede that the compensation carrier is entitled to recoup its compensation payment (S. F. 207) in spite of the right of subrogation afforded compensation carriers against negligent third parties by the workmen's compensation laws of the State of Texas."

These statements do not accurately reflect the record. Without cluttering this brief with details, it is necessary only to point out that:

(1) Petitioners state in their pleading that if Baker was not within the provisions of FELA, that Nichols' compensation carrier, Employers Mutual Liability Insurance Co. of Wisconsin (hereinafter called "Insurance Co.") is subrogated to the rights of Petitioners out of any amount

recovered by Petitioners from Texas and Pacific Railway Co. (R. 10, 11.).

(2) During the trial on October 3, 1956 it was stipulated by counsel for both parties that if the Insurance Co. has the right of subrogation against Respondent, T & P Ry. Co., the amount to which it was entitled is seven thousand nine hundred and nineteen dollars and ninety-four cents.

(3) At the same time counsel for both parties agreed that they did not stipulate that said Insurance Co. is entitled to subrogation in the event it be found that Baker was covered by the provisions of FELA (R. 161.).

(4) On October 4, 1956, Insurance Co. filed a plea in intervention claiming a right of subrogation to the rights of Petitioners to the extent of payment made to Petitioners under the Workmen's Compensation Act and entitled to have judgment out of any recovery from T & P Ry. Co. Insurance Co. plead in the alternative that if Baker is found to be an employee of T & P Ry. Co. that the compensation award to Petitioners was made by mutual mistake and that it was entitled to recover the award out of any recovery by Petitioners from T & P Ry. Co. (R. 24-26).

(5) And on the same day, the Respondent, T & P Ry. Co., amended its answer to state that if it should be determined that Baker was an employee of Respondent then the Insurance Co. is not entitled to be subrogated by reason of payment of Workmen's Compensation to Petitioners because by making such payment it was a pure volunteer (R. 19).

No denial or answer to Insurance Co.'s plea of intervention was ever made by Petitioners.

B. The Compensation Award to Petitioners Was a Fact for the Jury to Consider had It Been Permitted to Pass on Whether Nichols Was or Was Not an Independent Contractor.

It is arguable that the fact that Nichols carried Workmen's Compensation insurance and other insurance, to meet the indemnity obligations imposed upon him by the contract with Respondent, is a fact indicating that Nichols was really an independent contractor. But the more plausible argument is that it is a fact from which the jury could have found he was not. This latter argument is supported by direct authority.

In *Erie R. R. Co. v. Marque*, 23 F. 2d 664 (C. A. 6th 1928), the so-called independent contractor was also required by the contract with the railroad to comply with the Workmen's Compensation Laws of the state. The court said at p. 665 that it had no trouble in believing the intent of this provision was to evade the force and effect of FELA for the purpose of substituting the state Workmen's Compensation Act for FELA because the smaller compensation given under the state act would make it more economical from the employer's stand point to operate. It then held as a matter of law that the contractor was not independent.

Cimorelli v. New York Cent. Ry. Co., 148 F. 2d 575 (C. A. 6th 1945), relied upon by Respondents on page 8 of their brief, is discussed extensively, pages 29, 30 *supra*. In *Cimorelli*, the contractor, Duffy, was required to carry

full insurance coverage including Workmen's Compensation. And like the case at bar, there was a special provision in the contract that Duffy was to perform the work as an independent contractor with exclusive supervision of the work. But again the Court held as a matter of law that the contractor was not independent.

Even where the railroad itself is a subscriber to a state workmen's compensation insurance for its employees engaged in intrastate commerce, most of the cases have held or recognized that the payment and acceptance of compensation under the state workmen's compensation act did not preclude the maintenance of an action under FELA by one engaged in interstate commerce within the meaning of that act. The basis of these cases is that award, settlement or acceptance of benefits under workmen's compensation cannot be treated as res judicata of the issue of the employee's engaging intrastate or interstate commerce. *Hoffman v. New York, N. H. & H. R. Co.*, 74 F. 2d 227 (C. A. 2d 1934), cert. den. 294 U. S. 715 (1935); *Pritt v. West Va. Northern R. Co.*, 51 S. E. 2d 105 (S. C. W. Va. 1948), cert. den. 336 U. S. 961 (1949). And see annotation at 6 ALR 2d 581 (1948) which is directly in point.

There is no basis in the record to argue that the compensation award to Petitioners was res judicata of the issue of whether Nichols was or was not an independent contractor. Nor any basis that it created any election, waiver or estoppel with regard to such issue. At the most, it was merely a fact for the jury's consideration—it is had been permitted to pass on said issue.

POINT TWO: Nichols was not an independent contractor because the contract provided for Nichols to perform Respondents non-delegable duties and its effect is to permit Respondent to exempt itself from its liabilities under FELA in violation of Sec. 55 of FELA.

The Federal and Texas statutes impose upon Respondent the non-delegable duty to maintain its railroad facilities including of course its tracks and roadbed, Section 1(3), (4) and (21) of the Interstate Commerce Act, 49 U.S.C. Section 1(3), (4) and (21); Article 6506 and 6507, *Vernon's Texas Statutes* (1948), Appendix "A" *Infra*, pp. 45-52; *Erie Railroad Co. v. Marque*, 23 Fed. 2d 664 (C. A. 6, 1928); *Atlantic Coast Line Ry. Co. v. Treadway*, 120 Va. 735, 93 So. E. 560 (1917), cert. den., 245 U. S. 670 (1918). Section 51 of FELA imposes such a duty, *Pederson v. Delaware, L & W Ry. Co.*, 229 U. S. 146, 151 (1913). But Respondent has attempted to exempt itself from any liabilities by having a certain type of its non-delegable maintenance work done by Nichols under a contract labeling Nichols an independent contractor and providing that Nichols shall fully indemnify Respondent for any liability arising from the performance of the work. Therefore the contract is void under Section 55 of FELA.

The opinion attempts to avoid the effect of the non-delegable nature of the maintenance work done by indicating that "extraordinary" or "special" maintenance work is delegable even though "regular" maintenance work is not delegable under *Erie Railroad Co. v. Marque*, *supra* (R. 215). No authority is cited for such a proposition ex-

cept *Norman v. Spokane-Portland & Seattle Ry. Co.*, 101 F. Supp. 350 (1950) aff'd., 192 F. 2d 1020, cert. den., 342 U. S. 945. But in *Norman* the parties *stipulated* that

> "Gilpin was in fact a truly independent contractor acting under a bona fide contract with the railroad, which was not designed or intended as a scheme or artifice to evade the provisions of [FELA]."

But use of the adjectives "special" or "extraordinary" can not change the fact that the work was one method selected by Respondent to maintain its tracks in a condition required of it by law. The record does not reflect what other methods could have been used. Regardless of the adjectives applied, it was maintenance work essential to the proper and safe function of the railroad and bore a direct relationship to the operation of the Respondent's main lines in interstate commerce.

The opinion also attempts to avoid the "intent or purpose" of the contract by relying on the opinion of Respondent's assistant chief engineer that the contracts was not a scheme or device to get around FELA. Instead it should have applied the rule long ago laid down by this Court in *Philadelphia, Baltimore & Washington R. R. Co. v. Schubert*, 224 U. S. 603, 613 (1912) that the words "purpose or interest" do not refer simply to an actual intent to circumvent the statute. Regardless of the intention of the parties, if the necessary operation and practical effect of the contract is to exempt the carrier from any liability imposed by FELA, the contract is void.

Petitioners urge this Honorable Court to consider the possible effect the Texas court's opinion will have upon the

future operation of FELA, at least in Texas. Under such opinion it is possible for a carrier to contract for "independent contractors" to do all of its required work except the actual operation of trains. It should be reversed "to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri P. R. Co.*, 352 U. S. 500, 507 (1957).

POINT THREE: Claude Baker was doing maintenance work as part of Respondent's unitary enterprise and exposed to all of its inherent dangers, therefore he and workers in his position should be classified employees of carriers within the meaning of FELA.

Baker was, and many workers like him, are doing the carrier's work such as this maintenance work. Their duties are in the furtherance of interstate commerce or their duties directly or closely and substantially affect such commerce. Though by legal form they technically are employees of an "independent contractor" the actual, practical fact is that they are railroad workers giving their labor to the furtherance of the carrier's enterprise and daily exposed to the risks inherent in railroad work. They should be classified as employees of the carrier within the meaning of FELA because they fit the definition of such employees and all the reasons exist for including them under the broad purpose of FELA.

Sinkler v. Missouri P. R. Co., 356 U. S. 326 (1958) dealt with the scope of the meaning of the word "agent" in FELA. Here we are concerned with the scope of the meaning of the word "employee". Petitioners urge that all the

reasons expressed in the *Sinkler* case are also present for giving an accommodating scope to the word "employees" to give vitality to the standard governing the liability of carriers to workers injured while doing the carrier's work. Sinkler held the railroad liable for the negligence of an independent contractor, who is engaged in a "common endeavor" with the railroad. Nichols and its employees were likewise engaged in a "common endeavor" with Respondent, and Respondent itself has been found guilty of negligence causing Baker's death on Respondent's property. The negligence occurred during the passing of Respondent's trains on its interstate lines on which Nichols was performing maintenance work. And Respondent has retained control and the right to control every aspect of Nichols operation wherein in *Sinkler* no such control was retained. The movement of the trains was railroad business. The maintenance work by means of grouting was certainly railroad business especially since it was the kind of work Respondent admittedly could have done for itself.

But Respondent, rather than doing the necessary maintenance work itself, arranged with Nichols to supply the crew and equipment to perform this work on its behalf. Clearly, as in *Sinkler*, this work was done to further the task of Respondent's enterprise; and for purposes of FELA, Baker and the other crew members were as much a part of Respondent's total enterprise as was Respondent's inspector Slaton or its other regular maintenance employees. The principal is laid down in *Sinkler*, p. 330 that:

> "it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources,

> obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged is a common endeavor."

It is submitted that principle applies with equal force here. Even if Nichols was an independent contractor and was really free of detailed supervision of its operations by Respondent, this would be irrelevant, because at the time Baker was killed Nichols' crew members were engaged as part of that "unitary enterprise" in furthering the operational activities of Respondent.

That same basic principle has been applied to determine that workers were "employees" and not independent contractors under the Fair Labor Standard Act, *Rutherford Ford Corporation v. McComb*, 331 U. S. 722 (1947). In admiralty it has been applied to determine that a worker employed by an independent stevedoring company is nevertheless a "seaman" when doing a seaman's work and incurring a seaman's hazards. *Seas Shipping Co. v. Sieracki*, 326 U. S. 85 (1946).

This Honorable Court is urged to consider the combination of factors present in the case at bar leading to the reasonable conclusion that Baker was as a matter of law, an employee of Respondent within the meaning of FELA. Baker was doing Respondent's work and exposed to the inherent risks. He was a part of its unitary enterprise in carrying out its franchise obligations. These obligations are statutory and non-delegable. The necessary operation and effect of the contract was to exempt Respondent of some of its statutory obligations. It was therefore void and

illegal. Admittedly the details of the work were controlled by Respondent. Of necessity Respondent had the right to control, as well as the power to control, the details of the work.

Conclusion

The judgment and opinion of the Court of Civil Appeals deprive Petitioners, and those similarly situated, of the right to trial by jury; deprive them of the protection of FELA and allow Respondent to avoid its liabilities under FELA. The opinion is in the teeth of Section 55. For all of the reasons herein given the judgments of the Court of Civil Appeals and the trial court should be reversed and remanded, with directions that W. H. Nichols is not an independent contractor or Claude Baker was an employee of Respondent within the meaning of FELA; or in the alternative, that a jury trial be had on these issues.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISION AND STATUTES

THE 7TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

In suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Sec. 51, 53 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency,

due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 53. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such

common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

INTERSTATE COMMERCE ACT, 41 Stat. 474, 49 U.S.C., Sec. 1 (3), (4) and (21)

Section 1.

(3) *Definitions.* The term "common carrier" as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this chapter it shall be held to mean "common carrier." The term "railroad" as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including

all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this chapter shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) *Duty to furnish transportation and establish through routes; division of joint rates.* It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reason-

able, and equitable division thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(21) *Power of Commission to require adequate facilities or extension of line—Penalty.* The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] party to such proceeding to provide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title], and to extend its line or lines: Provided, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any public carrier subject to this part [§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title] which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue in the United States and may be recovered in a civil action brought by the United States.

Art. 6506. Vernon's Texas Statutes (1948), Maintenance; powers of Commission

The Commission shall see that each railroad corporation owning or operating a line of railroad in this State shall maintain its roadbed and track in such condition as to enable it to perform all of its duties as a common carrier with reasonable safety to persons and property carried by it and its employes and with reasonable dispatch. The Commission is vested with full power to require any railroad company to purchase or secure for installation in its roadbed or track all ties, rails, ballast and other material and equipment as may, in the judgment of the Commission, be necessary for the proper maintenance of the whole or any designated portion of such track and roadbed so as to put the same in safe condition and enable such railroad to adequately perform its duties to the public and to transport freight and passengers with safety and dispatch.

Art. 6507. Vernon's Texas Statutes (1948), Penalty for failure to comply.

When the Commission has made such order as authorized by the preceding article, each railroad company subject thereto shall promptly comply with the terms thereof, and for failure or refusal to do so, such company or its receiver shall become liable to the State of Texas, for a penalty of not less than five hundred nor more than five thousand dollars for each offense. In addition to such penalties, any court of competent jurisdiction upon application of the Attorney General shall issue writs of mandamus and mandatory injunctions and other proper writs to compel the compliance with such orders.

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In the

Supreme Court of the United States

OCTOBER TERM 1958

No. 363

DOVIE RAY BAKER, *et al.*,
Petitioners,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

BRIEF FOR RESPONDENT

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In the

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No. 363

DOVIE RAY BAKER, *et al.*,
Petitioners,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

The questions presented in this case are:

(a) Whether Respondent owed decedent a non-delegable duty to perform the particular work through its own employees.

(b) 1. Whether there was any evidence, or sufficient evidence, to raise a jury issue as to whether Respondent's purpose and intent in entering into the contract with Nichols was to evade the provisions of the Federal Employers Liability Act;

2. Whether there was any evidence, or sufficient evidence, to raise a jury issue as to Nichols' occupying any status other than that of independent contractor; and

3. Petitioners' waiver of jury issues, if any were raised.

(c) Whether Congress intended to extend the benefits of the Federal Employers Liability Act to persons other than true employees of railroads.

STATEMENT OF MATERIAL FACTS

Claude Baker, an employee of W. H. Nichols & Co., was killed in an accident on Respondent's right-of-way on August 20, 1952. On August 25, 1952 his widow and minor children, Petitioners here, filed with the Industrial Accident Board of the State of Texas a Notice of Fatal Injury and a Claim for Compensation for Death, both of which documents specifically asserted that Baker had sustained his fatal injuries while employed by W. H. Nichols & Co. (R. 200, 201.) In due course, Petitioners accepted a settlement in the amount of SEVEN THOUSAND NINE HUNDRED NINETEEN AND 94/100 ($7,919.94) DOLLARS from Employers Mutual Liability Insurance Company of Wiscousin, Nichols' workmen's compensation insurance carrier. (R. 11.)

In this suit for Baker's death, Petitioners seek to bring their case within a more remunerative statute than the Texas Workmen's Compensation Laws, the Federal Em-

ployers Liability Act, and accordingly they maintain, as they must, that on the trial below evidence was adduced sufficient to raise a jury issue that Baker was an employee of Respondent when he met his death. Furthermore, they claim that, even though Baker was not an employee of Respondent, he should be regarded as one for purposes of the Federal Employers Liability Act. At no time during the six and one-half years from the date of the accident until the present have they considered either the evidence that Baker was Respondent's employee or the policy of the Federal Employers Liability Act to be so compelling that they must return the $7,919.94 obtained from the compensation carrier upon the representation that Baker was an employee of W. H. Nichols & Co. (R. 154.)

The case has been tried twice before a jury, and on each occasion the verdict was for Respondent. (R. 59, 26-42.) The judgment for Respondent rendered at the conclusion of the second trial was affirmed by the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas. (R. 204-220; *303 S. W. 2d 92*). Petitioners' request for a hearing before the Supreme Court of Texas was twice denied on the ground that the opinion of the Court of Civil Appeals contained no reversible error. (R. 235, 237.)

The work which Baker was performing at the time of the accident is called grouting and is a method of stabilizing and strengthening a railroad's roadbed with a mixture of sand, water and cement. (R. 64.) Grouting is classified as special or extraordinary maintenance. (R. 139, 192.) Inasmuch as it requires special equipment which Respond-

ent does not own and special knowledge which its employees do not have, Respondent has always had its grouting work done by an independent contractor. (R. 134, 135, 190.) This appears to be the custom of the railroad industry. (R. 135.)

The evidence is undisputed that Respondent had sent out detailed proposals to two contractors, and, on the basis of bids received from them, selected W. H. Nichols & Co., Baker's employer, to do the work. (R. 191.) Nichols had been in business at least since 1949 or 1950. (R. 82.) There is no evidence that it was in any way connected with Respondent (R. 134), or that any of its officers or employees worked for Respondent. The resulting contract, which is printed in pertinent part at (R. 204-206), provided that:

> "In the performance of the work or services herein provided, or any part thereof, Contractor shall occupy the status of an independent contractor, and shall not be subject to the detailed supervision of Carrier but shall be responsible to Carrier only for the final results in the accomplishment of such work or services."

The grouting was accomplishad by pumping the grout mixture into an area of the roadbed previously specified, within *general* limits, by Respondent's engineers. (R. 138, 194, 195.) The exact spot within the area where the mixture was pumped was within the discretion of Nichols, the contractor. (R. 138, 180-181.)

Respondent had on the job an inspector named Slaton, whose duty it was to see that the work did not interfere with the operation of trains (R. 179) and that it was in accordance with the terms of the contract. (R. 140.)

The statements in the following paragraph are based exclusively upon evidence elicited from Petitioners' witnesses, including Mrs. Baker. Baker, who had worked for Nichols on a previous occasion in 1950 (R. 148), but had since made his living as a tenant farmer, was re-hired by Nichols in March or April, 1952 (R. 148). He was hired by Nichols' foreman (R. 121). Nichols' foreman told the grouting crew when to go to work (R. 83, 110, 117, 122) and what to do (R. 83, 117, 122); when the mixing machine was to be moved (R. 83); and when to stop work to eat (R. 110, 117, 122); and when to quit work for the day. (R. 83, 117, 122.) The men were paid exclusively by Nichols. (R. 85, 110, 117, 121.) Nichols withheld their income tax. (R. 85, 110, 121.) Nichols deducted their social security. (R. 85, 110, 121.) The men regarded themselves as Nichols' employees (R. 85, 110, 117, 122) and Nichols' foreman as their boss (R. 83, 110, 117, 122). They did not consider that they were working for Respondent. (R. 86, 117, 122.) Baker's situation was no different from that of Nichols' other employees. (R. 117.) He told his wife that he was employed by Nichols. (R. 155.)

MISLEADING STATEMENTS OF FACT IN PETITIONERS' BRIEF

Regretably, there are a number of assertions in Petitioners' brief which do not accurately reflect the evidence. Some of these are conclusions reached by extracting certain phrases from their context. Others have no support in the evidence.

At p. 7 of Petitioners' brief, it is stated that Savage (Respondent's assistant chief engineer) "first agreed that grouting work is simply part of the regular maintenance of the track; later he called it a special type of maintenance."

The exchange to which Petitioners refer is quoted below. Respondent respectfully leaves it to this Honorable Court to determine whether Petitioners' statement is a fair one.

> "Q. [by Petitioners' counsel] Is grouting simply a part of the regular maintenance of the track?
>
> "A. Yes, I would say that it is; it is not regular maintenance work, but it is a special type of maintenance." (R. 139.)

A pp. 9-10 of Petitioners' brief, it is stated that

> "Respondent's assistant chief engineer admitted * * * that the contract could be cancelled by Respondent at any time."

See also pp. 24, 27 for substantially the same assertion.

The true facts are that Petitioners elicited no evidence as to how the contract could be terminated. In contending otherwise, Petitioners attempt to create the unique rule that evidence is adduced when counsel asks a question, the other side objects before the witness has completed his answer, and the objection is sustained. (See R. 194.)

At p. 23 of petitioners' brief, it is stated:

> "Admittedly, the work was a type of maintenance which normally is part of the regular business of Respondent."

This statement is directly contrary to the evidence. It is undiputed that Respondent itself has never done any grouting work. (R. 134.) Furthermore, Respondent's assistant chief engineer, who has been connected with railroading virtually all of his adult life (R. 131), testified that he knew of no other railroad which used its own employees for grouting. (R. 135.) This testimony was not contradicted by Petitioners.

At p. 27 of Petitioners' brief, in the course of Petitioners' attack on the Court of Civil Appeals, it is stated:

> "The opinion overlooks the testimony of Respondent's own witnesses that under the contract the area to be grouted was *purely* up to the railroad and that the contract could be cancelled at any time." (Emphasis supplied.)

The area to be grouted was not purely up to the railroad. Respondent specified general limits within which the grouting was to be done. (R. 138, 194, 195.) The selection of points at which the grout mixture was to be pumped into the roadbed was within the contractor's discretion. (R. 138.)

As has been previously noticed, it is not true that there was testimony that the contract could be cancelled at any time.

At p. 39 of Petitioners' brief, it is stated:

> "It is arguable that the *fact* that Nichols carried workmen's compensation insurance and other insurance, to meet the indemnity obligations imposed upon him by the contract with Respondent, is a *fact* indicating that Nichols was really an independent con-

> tractor. But the more plausible argument is that it is a *fact* from which the jury could have found that he was not." (Emphasis supplied.)

There is no such "fact" in the record. Indeed, there was no evidence adduced as to why Nichols carried workmen's compensation insurance. However, a plausible explanation may be found in Art. 8306, Sec. 1, Tex. Rev. Civ. Stat. (1925), which provides, with exceptions not applicable here, that any person with more than three employees who does not carry workmen's compensation may not raise the common law defenses of assumption of risk, contributory negligence, or the fellow servant rule, in suits against him by his employee for injuries incurred on the job.

There is no evidence of "other" insurance.

SUMMARY OF ARGUMENT

Petitioners' contention that in the trial court they were deprived of a jury trial is, when analyzed, nothing more than an argument as to the sufficiency of the evidence. There is no evidence that Nichols occupied any status other than that of independent contractor. The contract between Nichols and Respondent clearly established this relationship, not only by a specific provision in which Respondent relinquished the power to control the details of Nichols' performance, but also by provisions which made Nichols' fee subject to the quantity of work he performed and bound Nichols to indemnify Respondent fo losses incurred as a result of the work. That the contract was let on bids, that Nichols had been in business for years, that Nichols was

in no way connected with Respondent and that Nichols controlled the workmen doing the actual labor are other circumstances strongly indicating that Nichols was an independent contractor. It is very important to note that Petitioners collected, and have for more than 6 years retained, workmen's compensation benefits procured upon the representation that their decedent was Nichols' employee and under a Texas statute which is inapplicable to railroad employees.

The supervision exercised by Respondent's inspector, heavily relied upon by Petitioners as evidence that Respondent controlled the details of Nichols' work, represented nothing more than the observation which, according to well settled principles of law, an employer may maintain over an independent contractor.

Not only is there no evidence that grouting is part of Respondent's regular business, the record affirmatively shows that Respondent has always had its grouting done by independent contractors because it has never had the equipment or the personnel to handle this kind of work. Furthermore, it is undisputed that railroads customarily contract out their grouting work.

Petitioners have failed to show any evidence that the contract between Nichols and Respondent, by either its design or effect, violated Section 5 of the Federal Employers Liability Act. They point to no case which holds that grouting is a non-delegable duty on the part of Respondent. On the contrary, it appears to be established that even the

railroad's duties of ordinary maintenance are delegable in so far as employees of independent contractor are concerned. The inclusion of an indemnity provision does not invalidate the contract. Petitioners have failed to establish a causal connection between Nichols' indemnity obligations and the fact that he carried workmen's compensation insurance.

In any event, Petitioners had the burden of requesting that the trial court submit to the jury appropriate issues embodying their theories that the contract was an evasion of the Federal Employers Liability Act and that grouting is ordinary maintenance work, and by their failure to submit these issues they waived their right to a favorable jury finding.

There is no support in legal or legislative history for Petitioners' contention that the Federal Emloyers Liability Act was intended to apply to employees of independent contractors who are performing tasks pursuant to a contract with a railroad. In recent years Congress has liberalized the benefits available to persons already covered by the statute, but there is no authority to be found in the Act or in its amendments which would justify extending its benefits to persons other than actual employees of railroads.

ARGUMENT

POINT ONE

Under the facts and circumstances of this case, Petitioners were not denied a jury trial.

As their opening point, Petitioners state dramatically that, in the trial court, they were denied their constitutional right to trial by jury. What they are actually contending, of course, is that the evidence raised a fact issue as to whether Baker's employer, W. H. Nichols & Co., was actually an independent contractor.

Certainly there can be no question but that, if there was no evidence, or insufficient evidence to raise a jury issue, that Nichols was not an independent contractor, the court properly declined to present the matter to the jury. This is true whether the trial was in a state court or a federal court.

The Federal Rules of Civil Procedure specifically provide for instructed verdicts. 28 U. S. C. A. *Rule 50*. And this Honorable Court has held that the granting of an instructed verdict in a proper case does not deprive the losing party of the right of trial by a jury. *Berry v. U. S.*, 312 U. S. 450 (1941). Other federal cases hold that a motion for summary judgment, as provided for by the Federal Rules, 28 U. S. C. A. *Rule 56*, may be granted in a proper case without infringing the right of trial by jury. *U. S. v. Stangland*, 243 F. 2d 843 (9th Cir. 1957); *Whitsell v. Alexander*, 229 F. 2d 47 (9th Cir. 1956), *Cert. den.*, 351

U. S. 932 (1956). Moreover, the former Rule 73, governing practice in the District of Columbia and providing for summary judgments, was upheld by this Court in *Fidelity and Deposit Co. of Maryland v. U. S., 187 U. S. 315 (1902).*

Therefore, the inquiry before this Court is not whether Petitioners were denied a trial by jury but whether they introduced sufficient evidence to warrant submission of their case to the jury. Of course, if, as to a particular portion of their case, they introduced sufficient evidence but failed to request appropriate issues, they cannot now be heard to complain that the issues were not submitted. *Texas Rules of Civil Procedure, Rule 279.* To the same effect, see *28 U. S. C. A. Rule 51. Comins v. Schrivener, 214 F. 2d 810 (10th Cir. 1954).*

In order to bring their case within the Federal Employers Liability Act, Petitioners were required to show that their decedent, Baker, was an employee of Respondent. To accomplish this, they had the burden of introducing evidence sufficient to take to the jury the question whether Nichols, Baker's employer, was not an independent contractor, or to show that Nichols' contract with Respondent was void under Section 5 of the Federal Employers Liability Act *(45 U. S. C. A., Sec. 55), Miles v. Pennsylvania R. R. Co., 182 Fed. 2d 411 (7th Cir. 1950).* As to the former, they failed. As to the latter, they not only failed, they did not even request appropriate jury issues. Accordingly, they were in no way deprived of their constitutional rights in the trial court.

A. There was no evidence, or insufficient evidence, to establish that W. H. Nichols & Co. occupied any status other than that of independent contractor.

1. *Respondent did not retain the right to control the details of the work.*

In determining whether a person is an independent contractor or a servant the primary test is the power of the employer to control the details of the work. *Singer Mfg. Co. v. Rahn, 132 U. S. 518 (1889); Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916); Conasaugh River Lumber Co. v. Wade, 221 Fed. 2d 312 (6th Cir. 1955), Cert. den., 350 U. S. 949 (1956).* It is the power to control retained *by the agreement* which is decisive, not the overt exercise of that power. *National Labor Relations Board v. Steinberg, 182 Fed. 2d 850 (5th Cir. 1950); 1 Larson, Workmen's Compensation Law, Section 44.00 (1952); Restatement of the Law Agency 2nd, Sec. 220 (1958).* Accordingly, the contract between Nichols and Respondent (R. 205, 206), must be carefully examined.

Section 3 of the agreement between Respondent and Nichols shows conclusively that Nichols was to occupy the status of independent contractor and was not to be subject to Respondent's supervision of details. (R. 206.) In other words, Respondent specifically relinquished the power of control.

Other parts of the contract confirm the fact that the relationship created was that of independent contractor and employer.

Under Section 2, payment was to be made by quantity of work performed. (R. 205.) Although Petitioners suggest in their brief, p. 24, without citing authority, that this fact indicates that Nichols was not an independent contractor, the law is otherwise. *Chicago, Rock Island & Pacific R. v. Bond, supra; Anno. 20 A. L. R. 686, 756 (1922).*

That Respondent bound itself to transport Nichols' workmen to and from the job is "not material." *Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920).* See also *Jones v. New York Central Ry. Co., 182 Fed. 2d 326 (6th Cir. 1950), Cert. den., 340 U. S. 850 (1950).*

Contrary to Petitioners' unsupported assertions (p. 23), Section 1 of the contract providing that the work was to be performed "to the satisfaction" of Respondent's engineers does not alter Nichols' status as independent contractor. *Casement v. Brown, 148 U. S. 615 (1893).*

Section 4 of the contract, requiring Nichols to indemnify Respondent for losses incurred as result of the contract work, is another strong indication that Nichols was an independent contractor. *Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916); Anno. 20 A. L. R. 686, 788 (1922).*

The other tests to which the courts frequently resort in determining whether or not a relationship is that of employer-independent contractor are primarily useful in establishing who has the power of control. *Standard Oil Co. v. Anderson, 212 U. S. 215 (1909).* These indicia also support Respondent's contention that Nichols was an independent contractor.

For example, it is particularly important to establish whether or not the person employed is engaged in a distinct occupation or business. *Restatement, Agency,* **supra,** Section 220, (2) (b). The evidence is, of course, undisputed that Nichols had been in business for years. (R. 82.) It is also significant that there is no evidence that Respondent owned any stock in Nichols' corporation. (R. 134), *Del Vecchio v. Pennsylvania R. Co., 233 Fed. 2d 2, 4 (3rd Cir. 1956), Cert. den. 352 U. S. 909 (1956),* and that the contract was let on bids. (R. 191).

Petitioner insists that the contract in question was terminable at the will of Respondent and that this indicates Respondent had the power to control Nichols. In a proper case, the fact that the contract is terminable at will is indicative of an independent contractor-employer relationship. *Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916).* On the other hand, it is frequently said that the right to discharge at will is one of the powers the master has over his servant. *27 Am. Jur., p. 501 (Independent Contractors, Sec. 21) (1940).* Indeed, it is difficult to visualize an employer having effective "power to control" without having the right to fire his employee; and, as the court below correctly ruled, Respondent did not have that power over Nichols. Since the contract was made in Texas (R. 204) and was to be performed in Texas (R. 205), it must be construed according to Texas law, which is that, when a contract is for personal services, and does not require the imposing of a special confidence, and its duration is not specified, it is not terminable at the will

of either party. *Foster v. Wright, 217 S. W. 1091 (Tex. Civ. App. 1919);* and see *Hall v. Hall, 308 S. W. 2d 12 (Tex. Sup. Ct. 1958).*

Another very important element of the "right to control" is control of the workmen doing the actual labor. *Del Vecchio v. Pennsylvania R. Co., 233 F. 2d 2, 5 (3rd Cir. 1956), Cert. den., 352 U. S. 909 (1956).* The record in this case is, of course, replete with evidence that the workmen [a typical one of whom was Petitioners' decedent (R. 117)] were under the control of W. H. Nichols & Co. Nichols hired them (R. 121), instructed them in their duties (R. 83, 117, 122), told them when to come to work (R. 83, 110, 117, 122), when to eat (R. 110, 117, 122), and when to quit work (R. 110, 117, 122), paid them (R. 85, 110, 117, 121), deducted social security and withheld income tax (R. 85, 110, 121), and discharged them (R. 86, 129). The workmen naturally regarded themselves as employees of W. H. Nichols & Co. (R. 85, 110, 117, 122) and not of Respondent (R. 86, 117, 122).

Finally, it is very significant that Petitioners by their own actions appear to regard Baker as an employee not of Respondent, but of W. H. Nichols & Co. They filed a Notice of Fatal Injury and a Claim for Death Benefits* under the Workmen's Compensation Laws of the State of Texas, in which they represented that Baker was an employee of W. H. Nichols & Co. Upon the basis of these representations they were paid the sum of $7,919.94, which amount they

*These documents were properly received in evidence in the trial court as admissions against Petitioners' interest. *Texas General Indemnity Co. v. Scott, 152 Tex. 1, 253 S. W. 2d 651 (1952).*

have retained until this date. Surely, some six years after the accident (R. 3) and more than five years after they engaged an attorney (R. 59), they should be on notice that the Texas Workmen's Compensation Laws are inapplicable to employees of a steam railroad. *Article 8306, Sec. 2, Tex. Rev. Civ. Stat. (1925).*

2. *The supervision exercised by Respondent was not of that character requisite to transform Nichols from an independent contractor to a servant of Respondent.*

There is evidence that Respondent maintained an inspector (Slaton) on the job, whose duties were to see that the work performed (1) was in conformity with the terms of the contract, and (2) did not interfere with the normal operation of Respondent's trains. (R. 194, 195.)

It is well settled that an employer has the right to exercise such control over an independent contractor as is necessary to secure the performance of the work according to the terms of the contract. *Casement v. Brown, 148 U. S. 615 (1893); Jones v. Royal Indemnity Co., 206 Fed. 2d 561 (5th Cir. 1953).*

Respondent's engineers, under the terms of the contract, selected the general area to be grouted. (R. 195). The exact spot at which the grout mixture was to be pumped into the roadbed, within the selected area, was left to the discretion of Nichols. (R. 196.)

There is no evidence that Respondent's inspector, Slaton, did more than designate the general areas to be grouted, as distinguished from designating special locations within the general area. The testimony of Petitioners' witnesses in this respect is that Slaton would take a piece of chalk and mark the ties (R. 77, 103, 108, 115); that he would show the locations for inserting the points (R. 101, 120); and that he would tell the men to move to a new location after the grouting was finished. (R. 76, 108).

This testimony is entirely in conformity with and in no manner conflicts with testimony of Respondent's witnesses that the railroad selected and determined the area to be grouted (R. 138), and that Nichols' employees determined the particular spot within the designated area at which to insert the points.

In contending that their witnesses' testimony established that Slaton was interfering with the details of the work, Petitioners misconceive the process by which grouting is done. It is not a matter of pumping the mixture into isolated water pockets; the contractor is given an area to grout, and the mixture is pumped into that entire area. (R. 180.) The precise point, within the given area, at which the mixture is pumped into the embankment is within the contractor's discretion. Slaton's duty was only to inspect to insure that the grouting was done in the area specified by the contract, and his testimony, together with that of Petitioners' witnesses, reflects nothing more than that he performed this duty. (R. 180, 181.)

Petitioners' testimony that Slaton would direct Nichols' employees to move the grout points when the mixture bubbled out of the right-of-way (R. 111) and directed Nichols' employees as to the mixture of sand, cement and water (R. 76) constitutes nothing more than that character of inspection or surveillance which an owner is entitled to maintain to insure that the contractor performs the work in accordance with the contract. *Chicago, R. I. & P. R. Co. v. Bond, 240 U. S. 449, 455 (1916).* The mixture that Nichols and his employees were supposed to maintain was 16 parts of sand to 1 part of cement (R. 186). It was Slaton's duty to see that Nichols' employees did not change the ratio to 14 to 1, 13 to 1, or 10 to 1. (R. 187.)

Slaton's instructions to Nichols' employees as to the distance the machines must be placed from the tracks were to insure the safety of the railroad's operations and compliance with the Texas statute, Art. 6559(b), Tex. Rev. Civ. Stat. (1925), which prohibits the placing of materials closer than 8½ feet from the center of railroad tracks. Respondent's actions designed to protect the public do not militate against the conclusion that Nichols was an independent contractor. *Dougall v. Spokane, Portland & Seattle Ry. Co., 207 Fed. 2d 843 (1953), Cert. den., 347 U. S. 904 (1954).*

B. There was no evidence, or insufficient evidence, that the work contracted for was of a character usually and ordinarily performed by Respondent.

In their brief, petitioners rely heavily on the theory that the answer to the question "whose is the work being performed," will establish that Nichols was not actually an independent contractor. Although an examination of "whose is the work being performed" is quite useful where the issue is whether an employee of one matter has in fact been "borrowed" by another master, *Standard Oil Co. v. Anderson, 212 U. S. 215 (1909)*, its utility for determining the existence of an employer-independent contractor relationship is open to some question. Indeed, Petitioners' own special requested issue admits that an independent contractor is necessarily a person who is doing work for another (R. 57). The test was rejected for this purpose in *Dougall v. Spokane, Portland & Seattle Railway Co., 207 Fed. 2d 843 (9th Cir. 1953), Cert. den., 347 U. S. 904 (1954).*

It appears that what Petitioners are really trying to contend is that Nichols was performing work which is normally and naturally part of the regular course of Respondent's business and that, consequently, Nichols was merely Respondent's servant. The difficulty with this contention is that there is no evidence in the record to support it. Petitioners' claim that "admittedly the work was a type of maintenance work which normally is a part of the regular business of Respondent" is, as has been noted, demonstrably false. (See pp. 6-7 of this brief.)

In *Cimorelli v. New York Central R. Co., 148 Fed. 2d 575 (6th Cir. 1945); Pennsylvania R. Co. v. Roth, 163 Fed. 2d 161; Cert. den., 332 U. S. 830 (1947)*, and *Pennsylvania R. Co. v. Barlion, 172 Fed. 2d 710 (6th Cir. 1949)*, the evidence was that the contracts involved called for unloading and loading railroad cars,* work which, as the court in *Cimorelli* pointed out, was so interwoven with what was, under the circumstances, the railroad's business, that its performance could not be committed exclusively to the discretion of an independent contractor.

In contrast, there is undisputed evidence in this record that Respondent had always had its grouting done by independent contractors because it has never had the equipment or the personnel to handle this kind of work. (R. 134.) Moreover, Respondent's experienced assistant chief engineer, a man who has been employed by several railroads and has spent virtually all his adult life in railroad work (R. 131), testified that, to the best of his knowledge, no railroad ever does its own grouting work. (R. 135.) Petitioners did not attempt to contradict this testimony, and therefore failed to establish, even prima facie, that grouting is "railroad work." As a matter of fact, the evidence of record—that the work is customarily done by independent contractors, and the work is not part of Respondent's regular business—strongly indicates that Nichols was an independent contractor. *Restatement Agency 2d, supra*, Section 220 (c) and (h).

* As this Court observed in *U. S. v. Sola*, [illegible] employees.

C. There was no evidence, or insufficient evidence, that the intent of the contract between Nichols and Respondent was to evade the provisions of the Federal Employers Liability Act.

There is, of course, no evidence of any actual intent on the part of Respondent to evade the Federal Employers Liability Act. The record shows unequivocally that W. H. Nichols & Co. had been in business for years before the present contract was let. (R. 82.) There was no evidence that Respondent owned any stock in W. H. Nichols & Co. (R. 134), and Petitioners did not even attempt to establish that any of Nichols' officers or employees had ever had any connection with Respondent. The contract was given to Nichols simply because Nichols furnished the more acceptable of the bids received. (R. 191.) This case is, therefore, unlike *Erie R. Co. v. Marque, 23 Fed. 2d 664 (6th Cir. 1928)*, where there was evidence that the railroad had attempted to establish as an independent contractor an organization composed of its own former employees.

Actually, Petitioners do not contend that they have proved that Respondent had a subjective intent to evade the law, but they argue that the contract between Nichols and Respondent, by its operation, violates Section 5 of the Federal Employers Liability Act, because (1) Respondent was attempting to assign to Nichols a "non-delegable" duty and (2) Nichols was to indemnify Respondent from liability arising from the performance of the contract.

None of the authorities cited by Petitioners hold that grouting is among Respondent's non-delegable duties. *Erie*

R. R. Co. v. Marque, supra, without citing authority, expressed the opinion that a railroad has a non-delegable duty to the public and "perhaps" to its employees to maintain its roadbed in satisfactory condition. *Atlantic Coast Line R. R. Co. v. Treadway's Adminx., 120 Va. 735; 93 S. E. 560 (1917); Cert. den. 245 U. S. 670 (1918)*, simply held that a person who operated a signal light for the railroad was its employee. *Pederson v. Delaware, L. & W. Ry. Co., 229 U. S. 146 (1913)*, was concerned with whether under the Federal Employers Liability Act an employee of the railroad who was engaged in maintenance work on an interstate track was engaged in interstate commerce.

More nearly in point than petitioners' authorities are *Boyd v. Chicago & N. W. Ry. Co., 217 Ill. 332; 75 N. E. 496 (1905)*, *Orange v. Pitcairn, 280 Ill. App. 566 (1935)*, and *Klar v. Erie Ry. Co., 118 Ohio St. 612, 168 N. E. 793 (1928), App. dism. 279 U. S. 818 (1929)*, holding respectively, that construction, maintenance, and repair work may be delegated by a railroad.

Moreover, there is considerable recent direct authority that a railroad's duty to keep its transportation facilities in reasonable repair is not non-delegable in so far as employees of independent contractors are concerned. *Norman v. Spokane, Portland & Seattle Ry. Co., 101 Fed. Sup. 350 (1950), Affirmed 192 Fed. 2d 1020 (1951); Cert. den. 342 U. S. 945 (1952); Dougall v. Spokane, Portland & Seattle Ry. Co., 207 Fed. 2d 842 (1953), Cert. den. 347 U. S. 904 (1954); Tinsley v. Massman Construction Co., 270 S. W. 2d 835 (Mo. Sup. Ct. 1954).*

The presence of an indemnity provision in the contract between Nichols and Respondent does not make the contract void under Section 5 of the Federal Employers Liability Act. *Drago v. Central Ry. Co., 106 Atl. 803 (Ct. of Errors and Appeals of New Jersey, 1919); Cert. Den., 251 U. S. 553 (1919); Chicago & N. W. Ry. v. Davenport, 205 Fed. 2d 589 (5th Cir., 1953); Gaulden v. Southern Pacific Co., 78 Fed. Sup. 651 (D. C. N. D. Cal. S. D., 1948), Aff. 174 Fed. 2d 1022 (9th Cir., 1948).* Section 5 was intended to invalidate agreements between the railroad and its employees whereby the employees would relinquish their rights under the Federal Employers Liability Act for inadequate consideration. *Philadelphia B. & W. R. Co. v. Schubert, 224 U. S. 603 (1912).*

Agreements by independent contractors to indemnify railroads were expressly upheld by this Court in *Wells Fargo & Co. v. Taylor, 254 U. S. 175 (1920)*, and *Chicago, Rock Island & Pacific R. Co. v. Bond, 240 U. S. 449 (1916).*

Closely allied with Petitioners' second point is their contention that because Nichols carried workmen's compensation in order to meet his indemnity obligations under the contract the jury could have inferred that he was not actually an independent contractor. Petitioners' premise that Nichols carried workmen's compensation in order to meet indemnity obligations is, as has been demonstrated, wholly without support in the evidence. (See pp. 7-8 of this brief.) Consequently, his conclusion that this was part of a scheme to evade the force and effect of Federal Employers Liability Act must also fall. It should be pointed out, however, that

neither *Erie R. Co. v. Marque*, supra, nor *Cimorelli v. New York Central Ry. Co., 148 Fed. 2d 575 (6th Cir., 1945)*, is authority for his conclusion. In both of these cases the purported contractor was required by the railroad to carry workmen's compensation. The contract in this case contained no such provisions.

D. In any event, by failing to request the submission of appropriate issues to the jury Petitioners waived any rights they may have had to a favorable finding as to B and C above.

Even assuming that Petitioners have raised some question as to whether the contract between Nichols and Respondent had as its purpose and intent the evasion of the liability provisions of the Federal Employers Liability Act, they waived any benefit they may now derive from that evidence by failing to request appropriate instructions in the trial court. The intent of the parties to an agreement under attack as violative of Section 5 of the Federal Employers Liability Act is a question of fact for the jury. See *Brown v. Pennsylvania R. Co., 158 Fed. 2d 795 (2d Cir., 1947)*. Unless Petitioners could establish that their decedent was in fact employed by Respondent rather than by Nichols, it was incumbent upon them to prove that the contract between Nichols and Respondent was void under Section 5. *Miles v. Pennsylvania R. Co., 182 Fed. 2d 411 (7th Cir., 1950)*.

Similarly, Petitioners, having pleaded that Baker was engaged in the business of the railroad had the burden of

requesting acceptable fact issues as to whether grouting was work customarily performed by Respondent's employees.

Rule 279, Texas Rules of Civil Procedure, provides that upon appeal, all independent grounds of recovery not established conclusively under the evidence and upon which no issue is given or requested are deemed to have been waived. This rule is not unique. To the same effect is Rule 51 of the *Federal Rules of Civil Procedure, 28 U. S. C. A. Rule 51.* One complaining of the trial court's refusal to give a requested instruction must show that he submitted it to the Court. *Comins v. Scrivener, 214 Fed. 2d 810 (10th Cir. 1954).*

Petitioners' contention (p. 33 of their brief) that whether grouting was part of Respondent's regular maintenance work is not an ultimate issue ignores the fact that there was no evidence of customary railroad work to lend any weight to his requested issue of whether Baker was an employee of an independent contractor. It was incumbent upon Petitioners to present their theory to the jury. *Miles v. Pennsylvania R. Co.*, supra, at 415.

And, of course, it is manifest that it is "surely" not Respondent's burden to request this issue. Proof of an employment relationship between Baker and Respondent is an essential part—indeed, the *sine qua non* of Petitioners' case. *45 U. S. C. A., Sec. 51. North Carolina R. Co. v. Zachary, 232 U. S. 248 (1914).*

POINT TWO

It was not the intent of Congress to extend coverage under the Federal Employers Liability Act to persons other than railroad employees, the term "employees" being used in the usual and ordinary sense.

In urging their third point, Petitioners admit what they have been contending for 42 pages is untrue: that Baker's employer was "technically" an independent contractor. However, they suggest that the "broad purpose" of the Federal Employers Liability Act requires that Baker be classified as an employee of Respondent. Their version of legal and legislative history and intent is not only inaccurate, when applied to the present case it reaches grotesque results.

At the outset, it is scarcely to be believed that the "broad purpose" of Congress was to allow Petitioners to collect compensation benefits upon the representations that their decedent was an employee of a contractor and that they had a valid claim under a statute whose benefits are unavailable to railroad employees, and then to retain these benefits while contending that their decedent was not an employee of the contractor at all but was actually an employee of the railroad. As a great judge of this Court once observed in a related situation, "He may not litigate his claim for damages while clinging to the fruits of the contract which he elects to disaffirm." *Brassel v. Electric Welding Co., 239 N. Y. 78, 154 N. E. 745 (1924).*

The Federal Employers Liability Act was enacted because "Congress was dissatisfied with the common law duty of the master to his servant." *Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 508 (1957).* In the 1939 Amendments to the Act (53 Stat. 1404), Congress overruled prior constructions of the earlier Act and insured that the defense of assumption of risk could not be interposed, *Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54 (1943),* and that the Act covered railroad employees who, although not actively engaged in actual transportation, furthered or substantially affected interstate commerce, *Reed v. Pennsylvania R. Co., 351 U. S. 500 (1956)* (clerical *employees of the railroad); Southern Pacific Company v. Gileo, 351 U. S. 534 (1956)* (employees in workshop *owned by railroad).* A decision of this Court that even persons so intimately connected with the railroad enterprise as Pullman porters were employees of an independent contractor had been on the books for nearly 25 years, *Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84 (1915);* but, although the purpose of the 1939 Amendments was to overrule decisions which Congress thought unduly restrictive, *Rogers, supra,* at p. 509, Congress manifested no intent that the scope of the term "employees" be extended beyond its ordinary meaning.

Sinkler v. Missouri Pacific R. Co., 356 U. S. 328 (1958), simply held that a person who was admittedly an employee of the railroad could recover from the railroad for the negligence of the railroad's agent. The term "agent" was given an accommodating scope in order that the purposes

of the Federal Employers Liability Act might be achieved, i.e., to place the cost of injury to *railroad employees* on those most able to bear it. When Petitioners claim that *Sinkler* is applicable, they beg the question.

Rutherford Food Corp. v. McComb, 331 U. S. 722 (1947), and *Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1945)*, both cited by Petitioners, are in no way comparable to the situation found in this case.

In *Rutherford*, boners of meat who worked exclusively in a slaughter house and whose work was merely one step in a process, the other steps of which were performed by persons who were admittedly employees of the slaughter house, were held to be employees of the slaughter house. There is no evidence that Nichols was performing work which was in any way related to work performed by Respondent's employees, and indeed there is ample evidence to the contrary. Nichols could more properly be compared to the truck drivers who were held to be independent contractors in *U. S. v. Silk, 331 U. S. 704 (1947)*, decided the same day as *Rutherford*.

The stevedores employed by stevedoring contractors were held in *Sieracki* to be among those to whom the shipowner owed his traditional obligation of seaworthiness. This was because they were doing "seamen's work", i.e., work which, historically, until recent times, was performed by members of the ship's crew. *328 U. S. at 96*. Petitioners point to no comparable "traditional obligation" on the part of railroads; and, though he makes many bald assertions that

grouting is "railroad work", the record is devoid of any evidence that grouting is historically or presently performed by employees of Respondent or any other railroad. Indeed, as we have seen, Respondent has always had its grouting done by independent contractors.

It was settled by this Court many years ago that, in the Federal Employers Liability Act, Congress:

> "used the word 'employee' and 'employed' * * * in their natural sense, and intended to describe the conventional relation of employer and employee. It was well known that there were on interstate trains persons engaged in various services for other masters. Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the Act." *Robinson v. Baltimore & Ohio Railroad Company, 237 U. S. 84, 94 (1915).*

See also *Hull v. Phila. & Reading Ry. Co., 252 U. S. 475, 479 (1920).* There is no evidence that Congress was any less "familiar with this situation" in 1939 when the Act was amended.

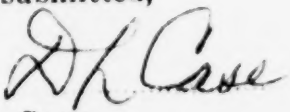
In the 50 years that the Federal Employers Liability Act has been the law, Congress has frequently liberalized its benefits, but it has never seen fit to extend the scope of the statute beyond railroading in its true sense. *Gaulden v. Southern Pacific Co., 78 Fed. Supp. 651 (D. C. N. D. Cal. S. D. 1948),* affirmed "for the reason stated in the opinion of the trial court." *174 Fed. 2d 1022 (9th Cir. 1948).* The purposes of that Act in no way compel an interpretation of the evidence in this case in favor of an employment rela-

tionship, particularly when the persons contending for that interpretation have accepted, and six years later still retain, benefits procured upon their word that the relationship did not exist.

CONCLUSION

For the reasons herein demonstrated, it is respectfully submitted that the judgment of the Court of Civil Appeals should be in all things affirmed, or, in the alternative, that certiorari should be dismissed.

Respectfully submitted,



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APPENDIX

FEDERAL EMPLOYERS LIABILITY ACT, 35 Stat. 65, 66, 53 Stat. 1404, 45 U.S.C., Secs. 51 and 55

Section 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Section 55. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Revised Civil Statutes of Texas, 1925, Art. 8306, Sec. 1—

Damages and compensation for personal injuries

In an action to recover damages for personal injuries sustained by an employe in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

1. That the employe was guilty of contributory negligence.

2. That the injury was caused by the negligence of a fellow employe.

3. That the employe had assumed the risk of the injury incident to his employment; but such employer may defend in such action on the ground that the injury was caused by the willful intention of the employe to bring about the in-

jury, or was so caused while the employe was in a state of intoxication.

4. In all such actions against an employer who is not a subscriber, as defined hereafter in this law, it shall be necessary to a recovery for the plaintiff to prove negligence of such employer or some agent or servant of such employer acting within the general scope of his employment.

Revised Civil Statutes of the State of Texas 1925. Art. 8306, Sec. 2. Application of law; exceptions

Sec. 2. The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employes of any firm, person or corporation having in his or their employ less than three employes, nor to the employes of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier. Any employer of three or more employes at the time of becoming a subscriber shall remain a subscriber subject to all of the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employes may at times be less than three.

Revised Civil Statutes of Texas, 1925, Art. 6559b. Structures near tracks

All loading platforms and all houses and structures, and all fences, and all lumber, wood and other materials hereafter built, placed or stored along the railroads of this State, either on or near the right of way of the main lines,

or on or near any spur, switch or siding of any such railroad, shall be so built, constructed, or placed that there shall be not less than eight and one-half (8½) feet space from the center of such main line, spur, switch or siding to the nearest edge of the platform, or to the wall of the building, or to the lumber, wood, or other material.

Federal Rules of Civil Procedure Rule 50. Motion for a Directed Verdict

(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move t have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury had been

discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Federal Rules of Civil Procedure Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Texas Rules of Civil Procedure. Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection and there is evidence to support a finding thereon, the trial court, at the request of either part, may after notice and hearing at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Public Laws-CH. 685-Aug. 11, 1939, 53 Stat. 1404, (Chapter 685)

AN ACT

To amend the Employers' Liability Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 1 and 4 of the Act entitled "An Act relat-

ing to the liability of common carriers by railroad to their employees in certain cases", approved April 22, 1908 (35 Stat. 65; U. S. C., title 45, secs. 51 and 54), be, and they are hereby, amended to read as follows:

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee, shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be

considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended."

"Sec. 4. That in any action brought against any common carriers under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Sec. 2. That the first sentence of section 6, of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908 (35 Stat. 65; U. S. C., title 45, sec. 56), be, and it is hereby, amended to read as follows:

"Sec. 6. That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued."

Sec. 3. That the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, as amended

(U. S. C., title 45, ch. 2), be, and it is hereby, amended by adding an additional section thereto as follows:

"Sec. 10. Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest shall, upon conviction thereof, be punished by a fine of no more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

"If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons and circumstances shall not be affected thereby.

Approved, August 11, 1939.